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# IMMIGRATION ACT OF CANADA

Frank N. Marrocco &  
Henry M. Goslett



CARSWELL





THE 1995 ANNOTATED

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# IMMIGRATION ACT OF CANADA

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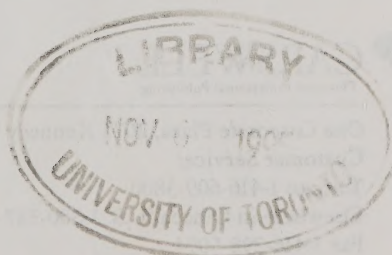
*Edited & annotated by*

Frank N. Marrocco, Q.C.

AND

Henry M. Goslett

*STATUTES OF CANADA ANNOTATED*



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Thomson Professional Publishing

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The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences - Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

The National Library of Canada has catalogued this publication as follows:

Canada

[Immigration Act, 1976]

The annotated Immigration Act of Canada

[1984]—

Annual.

Supplements accompany some issues.

ISBN 0-459-55863-3 (1995 : bound)

ISBN 0-459-55864-1 (1995 : pbk.)

ISSN 1182-1604

1. Emigration and immigration law — Canada.

I. Thomson Professional Publishing Canada.

II. Title. III. Title: Immigration Act, 1976.

KE4454.A32C65

342.71'082'02632

C90-031647-0

KF4483.15.C382

Typesetting: Video Text Inc., Barrie, Ontario, Canada



**CARSWELL**

Thomson Professional Publishing

One Corporate Plaza, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4

**Customer Service:**

Toronto 1-416-609-3800

Elsewhere in Canada/U.S. 1-800-387-5164

Fax 1-416-298-5094

AWV6363



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To

*Debbie and Mimi*

And to

*Alexandra, Jacqueline,  
Emily, Angela and Ted*



## Preface

We are indebted once again to those members of the legal profession and those employees of Canada Immigration and the Immigration and Refugee Board for their constructive comments. All of these comments were most gratefully received and many of them have been incorporated into this year's edition.

We feel that it will be of great assistance to our reader if we summarize briefly the position of the alien at common law. In this regard, Lord Denning M.R.'s concise summary of the common law in the case of *R. v. The Governor of the Pentonville Prison, ex parte Azam*, [1973] 2 All E.R. 741 at 747 is most helpful:

At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse without giving any reason: see *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 49 at 168. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country: see *R. v. Brixton Prison (Governor), ex parte Solben*, [1963] 2 Q.B. 243 at 300, 301. The position of aliens at common law has since been covered by the various regulations; but the principles remain the same.

We believe the readers will be further assisted in understanding the evolution of the Immigration Law of Canada by referring to the annotations under section 3 of the Act.

This annotation will hopefully encourage a knowledge of and the orderly development of Immigration Laws and Procedures. There have been, in the past two years, far-reaching changes to the Immigration Act and Regulations. Not all of these legislative changes have been proclaimed and the reader will note the unproclaimed portions are highlighted and included in this annotation. Further, it is anticipated that significant amendments to the Act and Regulations will be proclaimed into law in 1995 and these will be provided when available in a timely fashion as supplements.

We have endeavoured to retain for the reader's benefit references to all decisions which we view as still relevant to the interpretation of the new legislation.

Readers will note that cases appearing under particular sections of the Act or regulations may have been decided under predecessor sections. As we indicated last year these predecessor sections have been re-numbered or may have undergone more substantive amendment. The cases affected by these changes have been placed under those current sections which we consider most appropriate.

We want to thank Natalie von Bergstrasesser, the librarian of the Federal Court of Canada in Toronto, and our publisher for their assistance in providing us with the unreported decisions of the court.

We wish to express our thanks to Carol Lageer, B.J. Caruso, Sandy Spremo, Alexandra Goslett, John Petrykanyn, Gary Moore, Noona Barlow and Sandy Milton for their assistance in the preparation of the 1995 edition. We also wish to recognize the



## PREFACE

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contribution of Pamela Hudson to previous editions of our text. Without the care and attention of these persons, this edition would not have been possible. This edition contains all relevant cases which have come to our attention as of June 30, 1994.

October, 1994

Frank N. Marrocco  
Henry M. Goslett

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# Immigration Act

## R.S.C. 1985, c. I-2

Am. R.S.C. 1985 (1st Supp.), c. 31, s. 99;

R.S.C. 1985 (2nd Supp.), cc. 10, 46;

R.S.C. 1985 (3d Supp.), c. 30;

R.S.C. 1985 (4th Supp.), c. 1, s. 27; cc. 28, 29, 30;

S.C. 1990, c. 8, ss. 51-55; c. 16, ss. 12, 13; c. 17, ss. 23, 24; c. 38; c. 44, s. 16; 1992, c. 1, ss. 73-78, 143; 1992, c. 47, ss. 77-78; 1992, c. 49, ss. 1-107; 1992, c. 51, ss. 52-53; 1993, c. 28, s. 78 [not in force at date of publication].

### Short Title

1. This Act may be cited as the Immigration Act. 1976-77, c. 52, s. 1.

### Interpretation

**DEFINITIONS** — “Adjudication Division” — “adjudicator” — “admission” — “Appeal Division” — “assisted relative” — “Board” — “Canadian Citizen” — “Chairperson” — “conditional departure order” — “conditional deportation order” — “conditional removal order” — “Convention” — “Convention refugee” — “departure order” — “dependant” — “Deputy Minister” — “employment” — “entry” — “examination” — “exclusion order” — “family” — “fund” — “immigrant” — “immigrant station” — “immigration officer” — “inadmissible class” — “landing” — “master” — “medical officer” — “member of a crew” — “member of the family class” — “Minister” — “owner” — “permanent resident” — “permit” — “port of entry” — “prescribed” — “Refugee Division” — “rejection order” — “removal order” — “senior immigration officer” — “transportation company” — “vehicle” — “visa” — “visa officer” — “visitor” — Multiple nationalities — Cessation of Convention refugee status — Exception — Deemed notification.

2. (1) In this Act,

“Adjudication Division” means that division of the Board called the Adjudication Division;

“adjudicator” means a person appointed or employed as such pursuant to section 63.3;

“admission” means entry or landing;

“Appeal Division” means that division of the Board called the Immigration Appeal Division;

“assisted relative” has the meaning assigned by the regulations;

“Board” means the Immigration and Refugee Board established by section 57;

**“Canadian citizen”** means a person who is a citizen within the meaning of the *Citizenship Act*;

**“Chairperson”** means the Chairperson of the Board;

**“conditional departure order”** means a conditional departure order issued under subsection 28(1), paragraph 32.1(3)(b) or subsection 32.1(5) that has not become effective under subsection 28(2) or 32.1(6);

**“conditional deportation order”** means a conditional deportation order made under subsection 32.1(2), (3) or (4), 73(2) or 74(1) or (3) that has not become effective under subsection 32.1(6);

**“conditional removal order”** means a conditional departure order or a conditional deportation order;

**“Convention”** means the United Nations Convention Relating to the Status of Refugees signed at Geneva on July 28, 1951, and includes the Protocol thereto signed at New York City on January 31, 1967;

**“Convention refugee”** means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person’s nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person’s former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

**“departure order”** means a departure order issued under subsection 27(4) or 32(7) and includes a conditional departure order that has become effective under subsection 28(2) or 32.1(6);

**“dependant”** has the meaning assigned by the regulations;

**“deportation order”** means a deportation order made under subsections 32(2), (5) or (6), 37(5) or (6), 73(2) or 74(1) or (3) and includes

(a) a deportation order made under the authority of

(i) subsection 40(10) of the *Immigration Act, 1976*, chapter 52 of the

Statutes of Canada, 1976-77, as it read immediately prior to July 16, 1984,  
or

(ii) any immigration laws that were in force in Canada prior to April 10, 1978;

(b) a conditional deportation order that has become effective under subsection 32.1(6); and

(c) a departure order that is deemed pursuant to subsection 32.02(1) to be a deportation order;

“Deputy Minister” means the deputy head of the department under which this Act is administered;

“employment” means any activity for which a person receives or might reasonably be expected to receive valuable consideration;

“entry” means lawful permission to come into Canada as a visitor;

“examination” means any procedure whereby an immigration officer determines whether a person seeking to come into Canada may be allowed to come into Canada or may be granted admission;

“exclusion order” means an exclusion order made under subsection 23(4), 32(5), 73(2) or 74(1) or (3);

“family” means the father and mother and any children who, by reason of age or disability, are, in the opinion of an immigration officer, mainly dependent upon the father or mother for support and, for the purpose of any provision of this Act and the regulations, includes such other classes of persons as are prescribed for the purpose of that provision;

“fund” has the meaning assigned by the regulations;

“immigrant” means a person who seeks landing;

“immigrant station” means any place designated by the Minister for the examination, treatment or detention of persons for any purpose under this Act;

“immigration officer” means a person appointed or designated as an immigration officer pursuant to section 109;

“inadmissible class” means any of the classes of persons described in section 19;

“landing” means lawful permission to establish permanent resident in Canada;

“master” means the person in immediate charge or control of a vehicle;

“medical officer” means a qualified medical practitioner authorized or

recognized by order of the Minister of National Health and Welfare as a medical officer for the purposes of any or all provisions of this Act;

“member of a crew” means, except as otherwise prescribed, a person, including a master who is employed on a vehicle to perform duties during a voyage or trip related to the operation of the vehicle or the provision of services to passengers;

“member of the family class” has the meaning assigned by the regulations;

“Minister” means such member of the Queen’s Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Act;

“owner”, in respect of a vehicle, includes the agent of the owner of the vehicle and any other person having any interest in respect of the vehicle;

“permanent resident” means a person who

- (a) has been granted landing,
- (b) has not become a Canadian citizen, and
- (c) has not ceased to be a permanent resident pursuant to section 24 or 25.1,

and includes a person who has become a Canadian citizen but who has subsequently ceased to be a Canadian citizen under subsection 10(1) of the *Citizenship Act*, without reference to subsection 10(2) of that Act;

“permit” means a subsisting permit issued under subsection 37(1);

“port of entry” means any place designated as a port of entry by the Minister for the examination of persons under this Act;

“prescribed” means prescribed by regulations made by the Governor in Council;

“Refugee Division” means the division of the Board called the Convention Refugee Determination Division;

“rejection order” means an order made under paragraph 13(1)(b);

“removal order” means a departure order, an exclusion order or a deportation order;

“senior immigration officer” means an immigration officer designated by order of the Minister to perform or carry out any or all of the duties and functions of a senior immigration officer under this Act;

“transportation company”

- (a) means a person or group of persons, including any agent thereof and the government of Canada, a province or a municipality in Canada,



transporting or providing for the transportation of persons or goods by vehicle or otherwise, and

(b) for the purposes of subsections 89(2) to (7), sections 92 and 93 and paragraph 114(1)(cc), includes any such person or group that operates a bridge or tunnel or is a designated airport authority within the meaning of the *Airport Transfer (Miscellaneous Matters) Act*;

“vehicle” means any conveyance that may be used for transportation by water, land or air;

“visa” means a document issued or a stamp impression made on a document by a visa officer;

“visa officer” means an immigration officer stationed outside Canada and authorized by order of the Minister to issue visas;

“visitor” means a person who is lawfully in Canada, or seeks to come into Canada, for a temporary purpose, other than a person who is

- (a) a Canadian citizen,
- (b) a permanent resident,
- (c) a person in possession of a permit, or
- (d) an immigrant authorized to come into Canada pursuant to paragraph 14(2)(b), 23(1)(b) or 32(3)(b).

(1.1) For the purposes of the definition “Convention refugee” in subsection (1), where a person has more than one nationality, all references to the person’s nationality in that definition shall be construed as applying to each of the countries of which the person is a national.

(2) A person ceases to be a Convention refugee when

- (a) the person voluntarily reavails himself of the protection of the country of his nationality;
  - (b) the person voluntarily reacquires his nationality;
  - (c) the person acquires a new nationality and enjoys the protection of the country of that new nationality;
  - (d) the person voluntarily re-establishes himself in the country that the person left, or outside of which the person remained, by reason of fear of persecution;
- or
- (e) the reasons for the person’s fear of persecution in the country that the person left, or outside of which the person remained, cease to exist.

(3) A person does not cease to be a Convention refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.

(4) For the purposes of this Act, a person, including the Minister, shall, in the absence of proof to the contrary, be deemed to have been notified of a decision under this Act, other than a decision of a visa officer,

(a) where the decision was rendered otherwise than in the presence of the person and the person was not entitled to written reasons, on the day that is seven days after the day on which notice of the decision was sent to the person, and

(b) where the person was entitled to written reasons, or was entitled to request, and requested within the time normally provided therefor, written reasons, on the day that is seven days after the day on which the written reasons were sent to the person,

which notice or written reasons may be sent by mail. 1976-77, c. 52, s. 2; 1977-78, c. 22, s. 16; 1984, c. 21, s. 79; R.S.C. 1985 (4th Supp.), c. 28, s. 1; 1992, c. 49, s. 1.

### *Subsection (1)*

#### *Adjudicator*

*Satiacum v. Min. of Employment & Immigration* (1985), 64 N.R. 358 (Fed. C.A.).

The circumstance that the adjudicator and the case presenting officer were both public servants employed in the same department of government, without more, did not give rise to a reasonable apprehension of bias. An informed person viewing the matter realistically and practically would not conclude that it was more likely than not that the adjudicator would decide unfairly.

#### *Convention refugee*

*Editor's Note:* See the Schedule to this Act for Sections E and F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* concerning "Convention refugee" eligibility.

*Awale v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1083-92, May 12, 1994.

The applicant sought to review a negative determination of his refugee claim. The applicant was a citizen of Somalia and a member of a small, little-known clan. This clan was described as being neutral with respect to its position on the Barre regime. It came from a different heritage than the other clans, as evidenced, in part, by the lighter skin colour of its members. The applicant stated that the clan, including his family, were subject to harassment from all other clans in Somalia, including those loyal to and those opposed to the Barre regime. The applicant described instances of harassment and his evidence did not appear to be rejected.

It is trite law that in order to be well-founded, the applicant's fear must have both a subjective and objective component. There was nothing in the Board's decision to suggest that it doubted the applicant's credibility. If that was the case, then it must be said to have accepted the subjective element of the applicant's fear. However, there was no

documentary evidence filed in the hearing to support the allegations of persecution. The Board's decision referred to only one piece of documentary evidence, which actually supported the allegation of persecution of other clans in Somalia. However, the applicant's clan was unique and therefore the evidence of the persecution of other clans cannot be said to be similar. The Board did not mention all of the documentary evidence, but it was admitted that there was nothing in that evidence concerning the applicant's clan. The situation in Somalia continues to be dreadful; however, without some objective evidence supporting the allegations of persecution of the applicant's clan, the Board was correct in stating that the applicant's fear was an indiscriminate fear and not a basis for Convention refugee status.

*Ammery v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-5405-93, May 11, 1994.

The applicant, a female citizen of Iran, sought to set aside a negative determination of her refugee claim. The applicant, in her evidence before the tribunal, claimed that she and other members of her family were being harassed and persecuted because of the activities of her step-father. Even though it appeared that the tribunal erred in its consideration of the meaning of the word "persecution", the Court would not have intervened if the tribunal's assessment of the evidence was made by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained in that evidence. This did not happen in this case and thus the decision of the tribunal could not stand on that basis alone.

The tribunal also suggested that there was no documentary evidence to suggest that Iranian citizens were persecuted by their government because of their relatives' anti-government activities. This conclusion was not correct; there were two references in the documentary evidence on this question. Notwithstanding that fact, the Court was of the view that where there is evidence of the applicant, accepted as credible by the tribunal, even the absence of supporting documentary evidence is not a ground for finding a failure to establish good grounds for a fear of persecution.

*Roble v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-1101-91, April 25, 1994.

The appellant was born in Somalia and claimed a fear of persecution, if he were returned, at the hands of the National Security Service, which had been the security service used by former President Mohammed Siad Barre. The Board found as a fact that the National Security Service was no longer a factor in Somalia because the Barre government had been toppled.

The appellant submitted that when the political situation in a country is unstable and uncertain and an interim government is not yet in control, it is inappropriate for the appellant to be required to seek the protection of his state. There are situations in which the political and military circumstances in a country at a given time are such that it is impossible to speak of a government with control of the territory and able to provide effective protection. The non-existence of a government is not an obstacle to an application for refugee status. However, this statement of the law only applies to cases where a claimant has demonstrated a prospective risk of persecution based on one of the grounds enumerated in the definition. The finding that the agent of persecution



— the NSS — was no longer a factor meant that the inability of the state to protect the appellant was not in itself sufficient basis for his claim.

*Thamotharampillai v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-3365-93, April 22, 1994.

This was an application for judicial review of a negative decision of the CRDD. The applicant was found, by the relevant minister of the Government of Canada in February of 1985, to be a Convention refugee. On the 30th day of August, 1990 he was convicted of conspiracy to traffic in a narcotic and sentenced to three years. The CRDD found the applicant to have a well-founded fear of persecution. It found the applicant not to have an internal flight alternative. Despite these findings, it found the applicant not to be a Convention refugee as he was a person to whom the Convention did not apply because, in the terms of Article 1F(c) of the Convention, he was a person with respect to whom there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations. The crime committed by the applicant was one with international implications. Heroin was not a locally-produced narcotic. The crime in question was a crime against which the United Nations has initiated, coordinated and undertaken a range of international initiatives. It was a crime within Canada that potentially had fearful social, cultural and humanitarian, to say nothing of its economic, repercussions. Accordingly, the CRDD was correct in concluding that Article 1F(c) of the Convention excluded the applicant from Convention refugee status.

*Fathi-Rad v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-2438-93, April 13, 1994.

The applicant sought review of a decision determining that she was not a Convention refugee. The applicant was a fifty-one year old woman whose family supported the pre-revolutionary government and the People's Democratic Front in Iran. The applicant was arrested, detained and questioned approximately once every two months between 1985 and 1988 for her failure to conform to the Islamic dress code. In overruling the Board's decision, the Court concluded that the Islamic dress code in Iran was not a law of general application. The dress code applied only to women. It dictated the manner in which women must dress to comply with the religious beliefs of the governing regime and prescribed punishments for violation of that law. A law which specifically targets the manner in which women dress may not properly be characterized, as it was in this case, as a law of general application which applies to all citizens.

For this and other reasons the decision of the Board was set aside and the matter returned to a differently constituted panel for rehearing and redetermination.

*Keer v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2671-93, March 31, 1994.

The applicant sought to review a negative decision of the CRDD. The Board concluded that the applicant did not demonstrate that the state of India was unable to protect him. The Court relied on *Ward v. Canada (Min. of Employment & Immigration)*, (sub nom. *Canada (Attorney General) v. Ward*) [1993] 2 S.C.R. 689 to the effect that clear and convincing confirmation of a state's inability to protect must be provided. The burden of adducing clear and convincing confirmation of India's inability to protect was



on the applicant. The Court found that the conclusion of the Board that the applicant had not met the burden of proof was reasonable on the evidence and dismissed the application for judicial review.

*Kocherga v. Canada (Min. of Employment & Immigration)* (1994), 76 F.T.R. 128.

The applicants were a mother and son who claimed refugee status because of political opinion and membership in a particular social group. The mother was born in Argentina, moved to the U.S.S.R. with her parents and studied and taught there until 1967. She married a Cuban national and went to Cuba in 1967, where she worked at the University of Havana. One of the issues to be determined was whether the mother was still a citizen of Argentina. The Court followed the decision in *Bouianova v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 74 to the effect that a refugee claimant must establish that he is unable or unwilling to avail himself of all of his countries of nationality if his claim is to be upheld. There was no evidence that the mother had ceased to be a citizen of Argentina. Accordingly, the Board did not err in determining that the mother's claim had to be analyzed by reference to Argentina. Accordingly, the application for judicial review was dismissed.

*Abadjieva v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1654-93, February 25, 1994.

The applicant based her claim to refugee status on a well-founded fear of persecution if she were required to return to her country of citizenship, Bulgaria. The applicant in 1984 became aware of a fraudulent transaction involving the government. The fraudulent transaction touched the holder of a senior office in the Communist Party. Some years later, the applicant was summoned to the offices of the Security Service and threatened in the event that she disclose knowledge of the transaction. The threats directed by the Security Service officer were very serious. Where there was state complicity in the acts of persecution, the unwillingness of the applicant to attempt to avail herself of state protection was justified.

The Court further found that the Board misinstructed itself as to the test in respect of changed country circumstances. The Court quashed the decision of the CRDD and directed the matter back for a rehearing before a differently constituted panel.

*Cardenas v. Canada (Min. of Employment & Immigration)* (1994), 74 F.T.R. 214.

The applicant was unsuccessful in his claim for refugee status because he was found to have been an accomplice to crimes against humanity. The applicant was from Chile and had an association with the political faction, the Manuel Rodriguez Patriotic Front. In quashing the Board's decision, the Court noted that the Board had made little effort to link the applicant to specific criminal activities. Rather, it chose to refer only in general terms to shootings and bombings. The Board should have endeavoured to carefully detail the criminal acts which it considered the applicant to have committed.

The Board's decision was quashed on this and other grounds.

*Zhu v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-1017-91, January 28, 1994.

The appellant smuggled two students in the pro-democracy movement out of China and into Hong Kong. According to his testimony, his motivation in part was the fact that his wife was a friend of one of the smuggled young women. The panel was in

error in setting up an opposition between friendship and political motivation. The appellant's motives were mixed rather than conflicting. People frequently act out of mixed motives, and it is enough for the existence of political motivation that one of the motives was political. In this respect, although the appellant was not generally politically active, he had made a financial contribution to the pro-democracy movement. Accordingly, the appeal was allowed.

*Rodriguez-Hernandez v. Canada (Secretary of State)* (1994), 76 F.T.R. 107.

The applicant, a citizen of Cuba, claimed persecution on the basis of religion and political opinion. The applicant left Cuba for Canada while he was in possession of a valid travel permit, which allowed him to be absent for thirty days. In determining whether the applicant faced persecution for overstaying his exit visa, the Board considered that Cuban exit laws are of general application. This finding alone did not end the matter, however, for the law must still be examined to determine whether it is persecutory. One indication that a general law is persecutory is a penalty which is disproportionate to the offence. The Board did not err in concluding that the potential punishment for violation of the Cuban exit laws by the applicant did not amount to persecution. The onus was on the applicant to bring evidence before the Board of the punishment to be faced upon return and to demonstrate that the punishment is disproportionate to the offence. This onus had not been met, in this case, and the application for judicial review was dismissed.

*Maarouf v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 723, 23 Imm. L.R. (2d) 163, 72 F.T.R. 6.

The applicant lived in both Lebanon and Kuwait before going to the United States to study and then coming to Canada and claiming refugee status. The Board concluded that the applicant had neither a country of nationality nor a country of former habitual residence. The Board found that Kuwait was not a country of former habitual residence. Even though the claimant lived in that state for most of his life, on the claimant's uncontradicted evidence, there was no way that he could return there. It was the claimant's evidence that Palestinians who left Kuwait prior to the Gulf War were not allowed to return. With respect to Lebanon, the Board found that the claimant only lived there for five years during his infancy and, that while he did visit Lebanon for a short period of time, there was no significant period of *de facto* residence.

The decision of the Board was quashed. The definition of country of former habitual residence should not be unduly restrictive so as to pre-empt the provision of surrogate shelter to a stateless person who has demonstrated a well-founded fear of persecution on any of the enumerated grounds in the definition. A country of former habitual residence should not be limited to the country where the claimant initially feared persecution. The claimant does not have to be legally able to return a country of former habitual residence as a denial of a right of return may in itself constitute an act of persecution by the state. The claimant must, however, have established a significant period of *de facto* residence in the country in question.

*Kulanthavelu v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 124.

The CRDD determined that the applicant was not a Convention refugee. The applicant was a Tamil from Sri Lanka who, for most of his life before he came to Canada, lived in the Jaffna Region. The CRDD found that there was a reasonable possibility

of persecution by the LTTE if the applicant were returned to the Jaffna area today, but found an internal flight alternative (IFA) in Colombo. The CRDD acknowledged the advice of the UNHCR with regard to IFA's available to Sri Lankan Tamils from the Jaffna area. The Court construed the UNHCR letter as indicating that for Tamils from Jaffna, relatives, duration of previous residence and past employment are factors which go to the question of whether it is objectively reasonable for a claimant to live in Colombo without fear of persecution. There is no requirement for the CRDD or the Court to follow the contents of a letter from the UNHCR of the type presented in this case if there is also specific evidence before the CRDD that supports an IFA.

The question of an IFA must be expressly raised at the hearing. In this case, there was no evidence that notice was given to the applicant in advance of the hearing that the issue of an IFA would be considered. Nor was there any indication on the face of the transcript that the issue was "expressly raised at the hearing", although it was referred to in passing by counsel for the applicant. For that reason alone the Court would have allowed the application. The Court went on to further conclude that the applicant had discharged the burden on him, through the evidence of the UNHCR letter and of his personal experiences in Colombo, of proving the serious possibility of persecution throughout the country. The application was allowed and the matter referred back to the CRDD for rehearing by a differently constituted panel.

*Penate v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 171.

The applicant sought to review the denial of his refugee claim on the basis that he was excluded pursuant to Article I(F) of the Convention. One of the issues in the appeal was the test to be applied in assessing the relevance of changed country conditions to the applicant's wife's refugee claim. There are two separate procedures respecting refugee status which exist in the Immigration Act: (1) the granting of Convention refugee status to someone, by the IRB, on application by that individual and with respect to which the individual has the burden of proof; and (2) the removal of that status from someone, by the Board, upon application by the Minister and with respect to which the Minister bears the burden of proof.

This latter procedure is provided for in section 69.2 of the Act. The criteria described by Professor Hathaway in his text *The Law of Refugee Status* are framed by reference to the cessation of status, that is to the revoking of status after it has been granted and with respect to which the Minister, and not the individual, has the burden of proof. When the question is whether status will be granted, CRDD panels are required to weigh the evidence of changed country conditions in the balance with all the other evidence before them in assessing the applicant's claim.

The panel did not err in its approach. It weighed the evidence of changed country conditions as one aspect of the relevant evidence. Accordingly, the application was dismissed.

*Megag v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 164.

The applicants sought review of a decision denying them refugee status. They were citizens of Somalia who left there when the regime of Siad Barre was in power. This regime persecuted members of the applicant's tribe. The Refugee Division concluded that conditions in the north of Somalia are such that it would not have been unreasonable for the applicants to seek refuge there. Counsel for the applicants suggested that the Refugee Division had a legal duty to do more than make an unsupported conclusion



as to reasonableness. The applicant had the onus of showing that northern Somalia is not a reasonable internal flight alternative (IFA). The applicant's counsel referred to the instability in the north and the potential threats from other clans. Instability is not the only test of reasonableness. In this case, the applicant's entire family was in the north of Somalia and her uncle was a high-ranking official in that area. On that basis the conclusion that northern Somalia was not an unreasonable IFA was founded in the evidence. The Court referred to *Ahmed v. Canada (Min. of Employment & Immigration)*, Doc. No. A-1255-92, November 12, 1993 and *Akubakar v. Canada (Min. of Employment & Immigration)*, Doc. No. A-572-92, September 9, 1993 as cases in which the Refugee Division panels failed to consider evidence adduced by the applicants as to why northern Somalia was not a reasonable IFA. Here, little was said by the applicant on this question. Accordingly, the application was dismissed.

*Thirunavukkarasu v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 589, 22 Imm. L.R. (2d) 241, 109 D.L.R. (4th) 682, 163 N.R. 232 (C.A.).

The appellant was a citizen of Sri Lanka and a Tamil. The appellant's claim that he faced serious risk to his life in the north of Sri Lanka was accepted but his claim for refugee status was refused on the basis that there was an internal flight alternative (IFA) available to him.

The Court had occasion to review the law on the question of IFA's in this judgment.

The notion of an IFA is not a legal defence and it is not a legal doctrine. It is a convenient, short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country, but not in another. The idea of an IFA is inherent in the definition of a Convention refugee; it is not something separate. The definition requires that claimants have a well-founded fear of persecution which renders them unwilling or unable to return to their home country. If claimants are able to seek refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country.

The burden of proof with respect to an IFA is on the claimant. The claimant must show, on a balance of probabilities, a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA.

There is an obligation on the Minister or the Board to warn a claimant that the IFA issue will be raised. If the possibility of an IFA is raised, the claimant must demonstrate that there is a serious possibility of persecution in the area alleged to constitute an IFA. A refugee claimant enjoys the benefit of the privilege of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met. The purpose of this notice is to allow a person to prepare an adequate response. The right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice an IFA will be in issue at the hearing. A claimant must seek and resort to an IFA if it is not unreasonable to do so, in the circumstances of the individual claimant. This aspect of the test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. It is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own



country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so. It is not a question of whether the IFA is more or less appealing to the claimant than a new country. The question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way, the question to be answered is, would it be unduly harsh to expect the claimant, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?

An IFA cannot be speculative or theoretical. The alternative place of safety must be realistically accessible to the claimant. Any barriers getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or undergo undue hardship in travelling there or staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in isolated regions of their country, like a cave in the mountains, or in a desert or in a jungle, if those are the only areas of internal safety. Neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter situations to live in those places, without fear of persecution, then an IFA exists and the claimant is not a refugee.

It is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven in another country.

The finding of an IFA, in this case, by the IRB was not sustained. The Country Profile of Sri Lanka and the Amnesty International Reports on the country did not show "quite clearly" that Tamils were safe in the south west of the country. The reports, at the time this case was argued, spoke of several violent incidents in which Tamils were persecuted by the Sri Lankan government in the southwest in retaliation for the activities of the LTTE and other Tamil groups. Accordingly, there was no IFA for this appellant and the appeal was allowed.

*Namitabar v. Canada (Min. of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 150 (Fed. T.D.).

The applicants were brother and sister, and Iranian nationals. The sister was opposed to wearing the chador, a veil, in public. She was threatened with expulsion from school. She was twice brought before the komiteh and reprimanded. The law regarding wearing of the chador could not be a law of general application because it does not apply to men. Even if the law is generally applicable, the Refugee Division failed to consider the guidelines that should be used to determine whether persecution exists in this type of situation. The following principles apply to laws of general application:

1. the statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution;
2. the neutrality of an ordinary law of general application, vis-a-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required;

3. in such consideration, an ordinary law of general application, even in non-democratic societies, should be given a presumption of validity and neutrality, and the onus should be on a claimant to show that the laws are inherently or for some other reason persecutory;
4. it will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

It is easy to cover persecution with an appearance of legitimacy. In this case, the penalty for breach of the law, namely 75 strokes of the whip, is disproportionate. The authorities who arrest women apply the penalty without appearing before a judge because the crime is "self-evident". The female claimant demonstrated a context of harassment and intimidation arising from her failure to observe the clothing code and this could be regarded as a political act giving rise to a valid fear of persecution.

With respect to her brother, the panel in its decision did not indicate that it had examined the validity of the brother's claim. It is possible that the brother feared persecution for grounds relating solely to his family on account of the political opinion of his sister. The Refugee Division did not address this question. Accordingly, the decision of the Refugee Division with respect to the two applicants was quashed.

*Pathmakanthan v. Canada (Min. of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 76, 71 F.T.R. 154.

The applicants sought to review a decision that they were not Convention refugees. The Court analyzed the principles to be applied when determining that a claimant has an internal flight alternative (IFA). The first step involves a determination on the availability of the IFA. There may be an IFA if there is no evidence particular to the applicant which would lead one to conclude that there was a likelihood that the authorities would seek out the applicant. The tribunal must always examine the circumstances particular to the applicant to determine whether there is a serious possibility of this individual applicant being persecuted elsewhere in the country.

The second step in the analysis involves the determination of the reasonableness of the IFA. The reasonableness of the IFA is a question which must be determined independently from the question of availability and must take into consideration all of the circumstances of the individual applicant. In this case, the tribunal relied on the fact that the Federal Court had found in another case (*Rasaratnam v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 706, 140 N.R. 138 that Colombo was a reasonable IFA for that applicant, therefore Colombo must be a reasonable IFA for the applicants in this case. This constituted a serious error. The tribunal must consider all of the circumstances of the applicants in its determination that an IFA is reasonable. A finding of fact based on the findings in another case is not sufficient. The decision of the CRDD panel was quashed.

*Sinnathamby v. Canada (Min. of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 32, 70 F.T.R. 116.

The applicant was a Jaffna Tamil from Sri Lanka. In rejecting his claim for refugee status, the Board excluded extortion from the definition of persecution. It was not open to the Board to exclude extortion from the indicia of persecution without looking into the reason for the extortion and the motivation of the applicant in paying the extortion

fee. The decision of the Board was overturned and the matter was remitted back to the IRB for a hearing before a differently constituted panel.

*Osoble v. Canada (Min. of Employment & Immigration)* (1993), 69 F.T.R. 184.

This was an application to review a negative determination of the applicant's refugee claim. The applicant was from Somalia and based his fear of persecution on his religious convictions, political opinion and membership in a particular social group.

The test for applicants who are from a country where a civil war is going on was set out in *Salibian v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 250, 11 Imm. L.R. (2d) 165, 73 D.L.R. (4th) 551, 113 N.R. 123 (C.A.). A situation of civil war is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but a fear felt by the applicant himself or herself, or by a group of which he or she is associated, or on account of a risk of persecution based on one of the reasons stated in the definition.

*Hlavaty v. Canada (Min. of Employment & Immigration)* (1993), 22 Imm. L.R. (2d) 176, 69 F.T.R. 259.

This was an application to review a decision denying refugee status. The applicant lived in Trencin. He was subjected to harassment, in his early years, for being a Slovak and not being a member of the Communist Party. He joined the Slovak National Party, whose primary goal was an independent state. The party was attacked in the media for trying to break up what was then the country of Czechoslovakia. The claimant, who was found to be generally credible, described incidents of persecution.

The applicant contended that the tribunal could not have reached the decision it did if it had genuinely considered a document entitled "Reforming the Judiciary". The tribunal, in fact, quoted from a significant number of documentary sources in its evaluation of the conditions in Slovakia. It was open to it to conclude the way it did and the fact that it did not specifically refer to the document in question did not constitute an error because it was not apparent from the decision that the tribunal had failed to consider this piece of evidence.

The Board considered that there had been a change in circumstances since the applicant fled Czechoslovakia in November, 1990. Where a change in circumstances occurs prior to the determination of a claim, this change must be considered by the Board when assessing the objective basis to the claimant's fear. The nature and extent of the change in circumstances must be "significant", "material", "substantial" and "meaningful and effective".

The tribunal held that there was a valid internal flight alternative (IFA) available to the applicant. The determination of whether there is an IFA is integral to the determination of refugee status. The Court adopted the test set out in *Rasaratnam v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 706, 140 N.R. 138 (C.A.) and added the requirement in *Ahmed v. Canada (Min. of Employment & Immigration)* (1993), 156 N.R. 221 (Fed. C.A.), which required that the claimant find a secure substitute home without undue hardship.

The material before the tribunal showed that the applicant could avoid the persecution he suffered if he moved to another area of Slovakia. There was no evidence to the effect that the state was in any way implicated in the actions of the police in Trencin, which were part of the evidence of persecution.

The application for judicial review was dismissed.



*Mahmoud v. Canada (Min. of Employment & Immigration)* (1993), 69 F.T.R. 100.

This was an application for judicial review of a decision of the CRDD refusing a claim for refugee status. The case dealt with what is meant by a change in circumstances. The Court held that in order to make out a change in circumstances the change must be shown to be of proven durability, and adopted the test of Professor Hathaway in *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 200-203. The Court disagreed with two other Trial Division decisions on the question of proven durability, specifically *Boateng v. Canada (Min. of Employment & Immigration)* (1993), 65 F.T.R. 81 and *Tawfik v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 93-A-311, August 23, 1993. In most situations some reasonable period of time must go by in order to permit the trier of facts to assess the changing conditions and their consequences, if any. In this case, a transitional government was established in Ethiopia in July of 1991 and the Board, at the applicant's hearing in August, 1991, concluded that there had been a change in circumstances in Ethiopia, which were of an enduring nature and which rendered the applicant's fear of persecution no longer well-founded. The Court also declined to follow the Trial Division decision in *Villalto v. Canada (Solicitor General)* (1993), 68 F.T.R. 304 on the degree of proof required. The decision of the Board regarding the change in circumstance in Ethiopia did not meet the requirements of the three-pronged Hathaway test and accordingly, was set aside.

*Petrescu v. Canada (Solicitor General)* (1993), 73 F.T.R. 1.

The applicant was a Romanian claiming refugee status on account of his political opinion and membership in a particular social group. The Court elaborated on what was meant by a reasonable possibility of persecution and referred to *Ponniah v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 241, 132 N.R. 32 (Fed. C.A.):

"Good grounds" or "reasonable chance" is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50% chance (*i.e.* a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

If the claimant, as the Board said, "... may face slightly more than a mere possibility ..." of persecution, he had crossed the lower limit and had made his case of "good grounds" or a "reasonable chance" for fearing persecution.

In this case, it was said that the claimant, when he argued that he feared a repetition of what he had suffered if he returned home and that he was in danger of losing his liberty or being the victim of a staged accident, did not persuade the panel. The Refugee Division imposed too high a standard of proof. Accordingly, the decision of the Refugee Division was quashed.

*Oduro v. Canada (Min. of Employment & Immigration)* (1993), 73 F.T.R. 191.

The determination of change in circumstances in the context of the definition of refugee status is a mixed question of fact and law. Accordingly, the Board needs to provide a sufficient explanation of the facts in order that the reviewing Court may determine if the appropriate legal principles were applied.



*Villalta v. Canada (Solicitor General)* (1993), 68 F.T.R. 304.

The applicant arrived in Canada from El Salvador and claimed refugee status on the ground that he feared forced conscription into the army and he feared harassment by the guerillas who made efforts to require him to support or join them. He strongly disagreed with the methods used by the army and would not participate in it. While originally sympathetic to the guerillas, he could not accept their methods. On December 31, 1991 a peace treaty was signed by the guerillas and the government. This treaty was the result of twenty months of UN mediated negotiations. The applicant was found not to be a Convention refugee largely based upon the changed country conditions in El Salvador.

When determining whether status has been lost, one must ascertain that the reasons for the fear have ceased to exist. When determining whether status should be granted, changed country conditions, even those stopping short of cessation, is one factor among many which can be taken into account in determining whether the individual faces a reasonable chance of persecution. If the conditions set out in section 2(2) exist, there is absolutely no doubt that the individual is not entitled to status. However, this does not mean that in order to take changed country conditions into account when determining whether to grant status, that the panel must first go through the conceptual exercise of subtracting changed conditions from their analysis and then, after making that analysis, move on to assess the significance of the changed country conditions.

The tribunal did not commit an error by taking into account changed country conditions without first determining whether the requirements of cessation under section 2(2)(e) were met. Accordingly, the application was dismissed.

*Abdulle v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 229.

The applicant applied for judicial review pursuant to section 18.1 of the Federal Court Act seeking an order setting aside a decision that the applicant was not a Convention refugee. The applicant was a citizen of Somalia and a member of one of the two warring clans in that country. The Board held that the applicant's fear of persecution, based on membership in one of the warring clans, was not well-founded. There was no doubt that the applicant stood a reasonable chance of persecution upon her return to Somalia, as do all Somalians who live in Mogadishu. However, the applicant was unable to establish that she was in a different position from that of all Somalians in the capital city. The evidence did not establish that the applicant and her group would be singled out because of the conflict involving the two sub-clans. Accordingly, the application for judicial review was dismissed.

*Moreno v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 221, [1994] 1 F.C. 298, 159 N.R. 210, 107 D.L.R. (4th) 424 (C.A.).

The appellants appealed the rejection of their refugee claims because of the applicability of the exclusion clause appended to the definition of a Convention refugee. The application of the exclusion clause was premised on the Board's finding that there were serious reasons for considering that Mr. Moreno had committed crimes against humanity during the four months he served in the Salvadoran army.

In early January, 1988 the appellant, having just completed grade nine, was forcibly recruited into the army. He was sixteen years old. He spent four months in military service immersed in the army's training program. During this period he was assigned to general

guard duty. On one occasion he was required to stand watch outside of a prisoner's cell — a cell to which the appellant had not been given a key — while the prisoner was interrogated, tortured and eventually killed. Later, the appellant participated in five armed confrontations with guerrilla forces over a twenty-day period. As part of their training the recruits pledged their willingness to kill all guerrillas, as well as civilians believed to be guerrilla supporters. Immediately following the military campaign against the guerrilla forces the appellant was granted a three-day leave. He returned home, deserted the army and fled El Salvador.

The exclusion clause does not depend on whether a claimant has been charged or convicted. The Minister's burden is merely to meet the standard of proof embraced by the term "serious reasons for considering". The standard of proof is only relevant to questions of fact. Whether the act of killing civilians can be classified as a crime against humanity is a question of law. It is also a question of law whether the appellant's acts or omissions as a guard constituted a crime against humanity. Further, it is a question of law whether membership in a military organization, such as the Salvadoran army, constitutes sufficient complicity to warrant application of the exclusion clause.

Mere membership in an organization involved in international offences is not sufficient basis on which to invoke the exclusion clause. An exception to this rule arises where the organization is one whose very existence is premised on achieving political or social ends by any means deemed necessary. Membership in a secret police force may be deemed sufficient grounds for invoking the exclusion clause. Membership in a military organization involved in armed conflict with guerrilla forces comes within the ambit of the general rule and not the exception.

With respect to a guard, mere presence at the scene of a crime (torture) is not sufficient to invoke the exclusion clause. The act, however, of keeping watch with a view to preventing the intended victim from escaping may well attract criminal liability. The Court applied the criteria in *Dunlop and Sylvester v. R.*, [1979] 2 S.C.R. 881 to determine this aspect of the appeal and concluded that the appellant's acts or omissions would not have been sufficient to attract criminal liability as a matter of law. Criminal liability, however, was not the only issue to be determined. The Court had to decide whether the appellant's conduct satisfied the criteria set out in *Ramirez* "personal and knowing participation in persecutory acts". A person forcibly conscripted into the military, and who on one occasion witnessed the torture of a prisoner while on assigned guard duty, cannot be considered at law to have committed a crime against humanity because *mens rea* remains an essential element of the crime. Complicity rests on the existence of a shared common purpose as between principal and accomplice. In this case the appellant disassociated himself from the actual perpetrators by deserting the army within a relatively short period after his forcible enlistment. The closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach. Sixteen year-old foot soldiers should not be accorded the same legal treatment as those who commanded the war.

The Court noted that it would have been preferable for the Board to make a determination with respect to the appellant's refugee claim notwithstanding its decision to apply the exclusion clause.

Finally, the Court considered whether the female appellant's claim, which was dependent upon that of her husband, should fail as a result of the application of the

exclusion clause. Normally, if there is a likelihood that the principal claimant will be exposed to persecution, then it is as likely that those who are dependent on that claimant will also be persecuted on the basis of that relationship. Thus, even where the exclusion clause applies to one claimant, it cannot be said that those persons dependent on that claimant will therefore no longer be subject to persecution.

Accordingly, the appeal was allowed and the matter referred to a differently constituted panel for consideration on the basis that section F of Article 1 of the Convention had no application to the claims of these appellants.

*Kassim v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 126.

This application was brought to review a decision holding that the applicants were not Convention refugees. The fears of the applicants lacked an objectively valid basis, owing in part to changes in the political climate in Kenya. Changes in circumstances in the country of origin occurring prior to the hearing must be considered by the Board, since the Board must determine whether the claimant has good grounds to fear persecution in the future. The inquiry into a change in circumstances falls to be determined on a case by case, or country by country, basis. A change of circumstances is defined as a significant change occurring in the political or social situation in the country which the claimant has been forced to flee. The factor of recentness is not necessarily determinative in and of itself. The central issue to be determined by the Board is whether the change of circumstances is sufficient in terms of its effect on the social and political climate of the country of origin, given the basis of the fear on which the claimant relies. No change in government had occurred in Kenya. The lamentable human rights record of the regime in power was longstanding. The repeal of a section of the Kenyan Constitution was not sufficient to constitute a clear indication of the meaningful and effective change which is required to negate the objective basis of the applicants' claims. Accordingly, the applications were allowed.

*Brar v. Canada (Min. of Employment & Immigration)* (1993), 68 F.T.R. 57.

The applicant was a Sikh from the Punjab who unsuccessfully claimed refugee status on the grounds of religion, political opinion and membership in a particular social group. The Board had concluded that the applicant did not have a well-founded fear of persecution. The detention of the applicant for short periods while dignitaries were in his home village was consistent with the policy of preventive detention and represented an effort on the part of the government of the Punjab to prevent problems resulting from the potential actions of the organization of which the applicant was a member. The determination of whether or not an individual's treatment constitutes persecution is one of fact. National security and peace and order are valid social objectives for any state. Most states have measures which provide for the derogation of civil rights temporarily in time of emergency. This derogation of civil rights does not necessarily amount to persecution. Accordingly, the finding that the treatment accorded to the applicant did not amount to persecution could not be said to have been either perverse or erroneous. Accordingly, the application was dismissed.

*Chen v. Canada (Solicitor General)* (1993), 68 F.T.R. 9.

The CRDD found that the applicant was not a Convention refugee. At the opening of the hearing before the CRDD, counsel for the applicant introduced documentary evidence relating to a demonstration in front of the Chinese Consulate in Toronto that



took place in December, 1990 or early 1991. Some of the photographic evidence apparently included pictures of the applicant, showing him to be a participant. On the final page of the CRDD decision it referred to this material, erroneously characterized the translations as uncertified, and then concluded that since there was no further reference either in the oral testimony of the claimant or in counsel's submission to this matter, the claimant had abandoned his claim to be determined as a refugee *sur place*. Notwithstanding the fact that neither the applicant nor his counsel chose to take advantage of the opportunity provided by their appearance before the CRDD to pursue this aspect of the claim, the CRDD, when it recognized the documentary evidence in question as representing a basis for a possible *sur place* claim, was obliged, either at the close of the hearing or at a later date, to invite the applicant in specific terms to either make representations on the issue or abandon that aspect of the claim.

Accordingly, the decision of the CRDD was quashed and the matter referred back for rehearing and redetermination as it relates to the *sur place* elements of the claim or a separate *sur place* claim itself. The rehearing and redetermination was to be carried out by a differently constituted panel.

*Kahlon v. King* (1993), 66 F.T.R. 219.

The CRDD determined that the applicant was not a Convention refugee because a viable internal flight alternative (IFA) existed. The applicant was a citizen of India who feared persecution in his native Punjab State. The CRDD accepted as a fact the assertion that it was unrealistic for the applicant to consider a return to the Punjab. The risk of persecution, if he were to return to that state, was not in question, but the CRDD found that there existed a viable IFA. The criteria relevant to an IFA were reviewed by the Federal Court of Appeal in *Rasaratnam v. Canada*, [1992] 1 F.C. 706, 140 N.R. 138 (C.A.). The IFA concept is inherent in the Convention refugee definition. The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in that part of the country to which it finds an IFA exists. By definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country. Therefore, a claimant cannot be a Convention refugee if there is an IFA. Whether or not there is an IFA is integral to the determination of whether an applicant is or is not a refugee. The CRDD erred in failing to take into account the situations of individuals who were similarly situated to the applicant. It was not sufficient to take into account Sikhs in general living in India outside the Punjab or all Sikh men living in India outside the Punjab. The question before the tribunal was whether there was a serious possibility of the applicant being persecuted elsewhere in India. Accordingly, the decision of the CRDD was set aside and the matter referred back for rehearing before a differently constituted panel.

*Chan v. Canada (Min. of Employment & Immigration)*, 20 Imm. L.R. (2d) 181, [1993] 3 F.C. 675, 156 N.R. 279 (C.A.), leave to appeal to S.C.C. granted, Doc. No. 23813, Feb. 10, 1994.

This was an appeal with leave from a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board deciding that the appellant was not a Convention Refugee.

The appellant was a citizen of the People's Republic of China (PRC). During the cultural revolution the appellant's family was persecuted due to his father's background



as a landowner. During the students' pro-democracy demonstrations in 1989 the appellant expressed his support of the movement by giving food and drink to the students from his restaurant in Guangzhou Province. After the students' movement was crushed by the authorities and the appellant voluntarily reported his pro-democracy activities to the Public Security Bureau (PSB), officers visited his restaurant at least thirteen times, interrogating him, his staff and his customers. In November, 1989 the appellant's wife gave birth to a second child. When the PSB learned of this birth, they accused the appellant of violating the birth control policy of the PRC. Officers visited his home on a number of occasions after the birth of his child. The appellant was advised that either he or his wife would have to undergo sterilization. The appellant agreed to be sterilized but fled the PRC before the operation took place. The appellant claimed that after his departure his family continued to be harassed for violating the one child policy.

There were three decisions given by the Court, namely: the majority (Heald J.A. and Desjardins J.A.) dismissed the appeal; the minority (Mahoney J.A.) would have allowed the appeal.

Heald J.A. was not convinced on the evidence that the appellant had a well-founded fear of persecution and this determination would normally have been sufficient to dispose of the appeal. However, His Lordship went on to discuss the meaning of the phrase "particular social group" and "political opinion" in his judgment. The particular social group was defined to be parents in China with more than one child, who disagree with forced sterilization. This group was found by Heald J.A. not to be encompassed by any of the categories identified by the Supreme Court of Canada in the *Ward* decision (*Ward v. Canada (Min. of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 85, [1993] 2 S.C.R. 689). This group was found to be defined solely by the fact that its members face a particular form of persecutory treatment. Membership in the group was dictated by the finding of persecution. This logic reversed the statutory definition and voided enumerated grounds of content. The appellant's fear stemmed from what he did and not from what he was.

Disagreement with the one child policy is a political statement. There was no evidence that persons who simply voiced their opposition to this policy or to forced sterilization were not tolerated. On the question of whether the appellant who had breached the policy and failed to submit to the resulting demand for sterilization faced a well-founded fear of persecution, Heald J.A. answered in the negative. The persecutory treatment emanated not from a refusal to submit to sterilization, but from a breach of the policy. There was no indication that a breach of the one child policy and a reluctance to undergo sterilization would be perceived by the central government or the local authorities as anything more than a breach of a law and a reluctance to undergo the ensuing penalty. The one child policy is well within the jurisdiction of the Chinese government and there was a plethora of documentary evidence which articulated the rationale for this policy in China. Sanctions, in general, imposed for a breach of the policy must be accepted. A finding of persecution would have to be based uniquely on an abhorrence of the penalty. In other words the persecution alone motivates the determination of refugee status. Heald J.A. found that the definition of Convention refugee did not permit such a conclusion.

Desjardins J.A. agreed in the result and noted that with respect to the phrase "particular social group" what links the members of the group together must be so fundamental that it cannot be changed and if it were to be changed, would destroy the person as a person. The unchangeable characteristic of a particular social group must

be distinguished from the basic human right which the group might decide to defend. The innate characteristic must be so strong a factor that it makes a group of individuals what they are and it must exist independently of what they are fighting for. The appellant was one of a number of persons who, individually, had resisted the one child policy and, like the others of his category, faced the general sanction, namely forced sterilization. This was not a group that was affiliated in a fundamental way so as to qualify as a particular social group. The group of which the appellant claimed to be a member was cognizable by the decision of the local Chinese authorities to use forced sterilization as a means of enforcing government policy. Thus, what linked the group together was an external factor and this was insufficient to meet the definition of the term particular social group.

With respect to the ground of "political opinion", Desjardins J.A. accepted that any opinion on any matter related to state affairs expressed or imputed to a claimant may constitute the basis for a claim under political opinion. Her Lordship, however, was unable to infer that the local authorities would impute to the appellant a political opinion in this case on account of his resistance to a general government policy. The evidence showed that there was continuing popular resistance to family planning in China and that birth rates soared the moment the pressure was eased. Her Lordship noted that the treatment, in the case at bar, related to forced sterilization. The Court assumed that this was carried out through normal procedures currently in use by those who voluntarily opt for this procedure elsewhere, including Canada. What was objected to was the absence of consent. Her Lordship concluded that, unless amended, the *Convention Relating to the Status of Refugees* would not cover violations of human rights imposed by local authorities in the pursuit of what the record showed is a legitimate state objective, namely population control.

Mahoney J.A. dissented and found this case undistinguishable from *Cheung v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 81, [1993] 2 F.C. 314 (C.A.). He further found that none of the reasons which would justify a Court departing from its previous decisions were present in this case and that, therefore, *Cheung* had to be followed. Thus, the appellant could not be said not to belong to a particular social group. Further, he was in profound disagreement with the notion that the legitimacy of population control excluded persecution in pursuit of it from the Convention refugee definition.

*Ahmed v. Canada (Min. of Employment & Immigration)* (1993), 156 N.R. 221 (Fed. C.A.).

The reasons of the IRB must be read as a whole and must be sufficient to satisfy a review court that the panel has not misdirected itself as to the essential requirements of the principles involved and the meaning of the legal concepts that come into play.

The appellant, a citizen of Bangladesh, based his claim for refugee status on his political opinion and membership in a particular social group. His evidence was accepted as clear, consistent and credible. The tribunal found that the claimant was not in danger in a village a relatively short distance away from his own and, further, that the change in government in Bangladesh meant that the claimant could not, at the time of the hearing, have a fear of persecution which could be said to be well-founded.

Counsel for the respondent Minister maintained that these were findings of fact for which support could be found in the evidence and with which, therefore, the Court

should not interfere. This was not taken to be a wholly satisfactory answer. The two grounds were not only mere findings of fact drawn directly from the evidence. In both cases the evidence had to be interpreted and inferences drawn. The mere fact that the appellant lived a certain time without significant problems in a neighbouring village did not justify the conclusion that an Internal Flight Alternative existed. Further, the mere fact that there was change in government was not sufficient to meet the requirements of a change in circumstances.

The nature and agents of persecution feared by the appellant did not suggest that the persecution would be confined to a particular area of the country. Further, the mere declarations of a four-month old government to the effect that it had favoured the establishment of law and order could hardly be seen as a clear indication of a meaningful and effective change. Accordingly, the appeal was allowed and the matter sent back for reconsideration by a differently constituted panel.

*Rodionova v. Canada (Min. of Employment & Immigration)* (1993), 66 F.T.R. 66.

The CRDD determined that the applicant was not a Convention refugee. The CRDD found that the applicant belonged to no definable social group for which she might fear persecution.

The Court concluded that a woman can belong to a particular social group by being in danger of domestic violence without regard to whether the state permits, condones, acquiesces in, or fails to prevent such violence. Belonging to such a social group was simply a threshold test for establishing refugee status. If a claimant belongs to such a social group, she must still show that she fears persecution approved, permitted, or not effectively combatted by the state in her country of origin. In this case, this latter question was not specifically addressed by the panel hearing the refugee claim and accordingly, the Court could not conclude that the panel had decided that there was no reasonable fear of persecution.

The matter was therefore referred back to the CRDD for reconsideration.

*Singh v. Canada (Min. of Employment & Immigration)* (1993), 65 F.T.R. 110.

The applicant claimed refugee status and his claim was denied. The Refugee Division tribunal found that there was an Internal Flight Alternative IFA available to the applicant. One of the criteria that has to be resolved in finding an IFA is whether there is a serious possibility of the applicant being persecuted elsewhere. The tribunal misstated the test and found the existence of an IFA, based on its finding that there was not a "nation-wide campaign against Sikhs" being waged by the Indian government. Further the tribunal erred in inferring, from one piece of general documentary evidence about the social position of Sikhs outside the Punjab, that the applicant would be safe elsewhere in India. The tribunal cited no other evidence in support of its conclusion that because Bombay and Calcutta were not scenes of actual conflict, that the applicant would not be at risk there. Further, the tribunal did not address the question of whether in all the circumstances it would be reasonable for the applicant to go to one of those two cities. Accordingly, the decision of the tribunal was set aside.



*Ioda v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 294, 65 F.T.R. 166.

The applicant sought judicial review of a decision which found her not to be a Convention refugee.

The tribunal found that there was only a “mere risk” that the claimant might be a victim of persecution. The use of the concept “mere risk” as the appropriate basis for a finding was not correct. The claimant must establish, in order to demonstrate his or her fear of persecution as a valid basis, that he or she faces a “reasonable chance” or “good grounds” or “serious possibility” of persecution, should he or she be returned to the country of origin. A reasonable chance of persecution is anything more than a mere or minimal possibility with no intermediate ground.

*Zolfagharkhani v. Canada (Min. of Employment & Immigration)*, 20 Imm. L.R. (2d) 1, [1993] 3 F.C. 540, 155 N.R. 311.

This was an appeal of a decision denying Convention refugee status to the appellant.

The appellant was an Iranian citizen who had served twenty-seven months in the Iranian military during the Iran/Iraq war. Subsequent to his discharge, the Revolutionary Guards requested him to report for a further six months of military service as a paramedic. The appellant reported for a one-month training course and during the last week of training discovered the apparent intention of his government to engage in chemical warfare against the Kurds. His conscience being troubled by this, he deserted and fled the country.

No issue was raised as to conscientious objection in relation to war in general. Since the appellant had no objection to serving in an active capacity in the Iranian military in the Iran/Iraq war, the issue as to conscientious objection relates solely to participation in chemical warfare.

The probable use of chemical weapons, which the Board accepted as a fact, was clearly judged by the international community to be contrary to basic rules of human conduct. Consequently, the ordinary Iranian conscription law of general application, as applied to a conflict in which Iran intended to use chemical weapons, amounted to persecution for political opinion.

The Court set forth the following general propositions relating to the status of an ordinary law of general application in determining the question of persecution:

1. The statutory definition of Convention refugee makes the intent or any principal effect of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
2. The neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
3. In such consideration, an ordinary law of general application, even in non-democratic societies, should be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
4. It will not be enough for the claimant to show that a particular regime is generally oppressive, but rather that the law in question is persecutory in relation to a Convention ground.



The Court referred to *Abarca v. Minister of Employment & Immigration*, Doc. No. W-86-4030-W, decided March 21, 1986, to the effect that a conscientious objector from El Salvador was a Convention refugee on the basis of political opinion because he probably would have been forced to participate in violent acts of persecution against non-combatant civilians, which conduct is contrary to recognized basic international principles of human rights. The Court also referred to *Cruz v. Canada* (1988), 10 Imm. L.R. (2d) 47 (Imm. App. Bd.), involving a deserter from the Mexican army. In the instant case there could be no doubt that the appellant's refusal to participate in the military action against the Kurds would be treated by the Iranian government as the expression of an unacceptable political opinion.

The appeal was allowed and the matter returned to a differently constituted panel for reconsideration not inconsistent with the reasons of the Court.

*Bouianova v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 74.

The applicant was born in Komi, ASSR near Moscow in the former USSR. The applicant's place of birth is located in what is now Russia. Before coming to Canada the applicant had lived in Latvia for 14 years. The applicant claimed a well-founded fear of persecution in Latvia based on discrimination against ethnic Russians in that country. Latvia had been her country of habitual residence. The panel found that the applicant was a citizen of the Russian Federation and that there was no evidence that she had a well-founded fear of persecution in Russia. In order to become a Russian citizen, all that the applicant had to do was make an application to the Russian Embassy requesting Russian citizenship and have her USSR passport so stamped. The applicant did not do this and her counsel in this proceeding sought to claim that she was therefore stateless.

Statelessness was not an option for the applicant. The condition of not having a country of nationality must be one that is beyond the power of the applicant to control. Otherwise, a person could claim statelessness merely by renouncing his or her former citizenship.

*Boateng v. Canada (Min. of Employment & Immigration)* (1993), 65 F.T.R. 81.

The Refugee Division decided that the applicant was not a Convention refugee. There was evidence that persons returning to Ghana were subject to detention for several months. The panel found that this treatment did not amount to persecution. The Court disagreed with this conclusion but declined to upset the panel's decision because this conclusion had no particular relevance to the applicant's case as there was no evidence that the government of Ghana would have reason to believe that the applicant had sought refugee status in Canada.

*Re Nehru* (1993), 21 Imm. L.R. (2d) 53 (Imm. & Ref. Bd. (Ref. Div.)).

The issue before the Refugee Division was whether the claimant was described in Schedule F referred to in the definition of a Convention refugee. The Minister's representative referred to the fact that the claimant had been convicted of trafficking in a narcotic and sentenced to four months' imprisonment and that trafficking in narcotics was contrary to the purposes and principles of the United Nations.

The panel was of the opinion that countering world drug trafficking was the purpose of the United Nations. The panel was prepared to find that persons who committed acts

that are contrary to this initiative do not deserve international protection by countries who are signatories to the 1951 Convention and the 1967 Protocol.

In this case, however, the panel viewed the claimant's involvement in the illicit drug trafficking as marginal. It noted that the length of sentence (four months) did not persuade it of the seriousness of the offence committed by the claimant. Further, the Court that convicted the claimant recommended that monies possessed by the police at the time of his arrest be returned to him. Thus, the panel concluded that the claimant should not be excluded from protection and that he was not a person described in Schedule F of the definition.

*Canada (A.G.) v. Ward* (1993), 103 D.L.R. (4th) 1 (S.C.C.).

The appellant, Patrick Francis Ward, was born in Northern Ireland in 1955. He joined the Irish National Liberation Army (INLA) in 1983 as a volunteer. The INLA is a para-military organization, more violent than the Irish Republican Army (IRA) with a military-like hierarchy and strict discipline. Ward's first task as a member of the INLA was to assist in guarding two of the organization's hostages. After Ward commenced his duties the INLA ordered the hostages executed. Ward underwent what he described as "a predicament of moral conscience" and released the hostages without revealing himself to the INLA. Sometime later the police let slip to an INLA member that one of their own had assisted the hostages in their escape. Ward was court-martialled and sentenced to death, however he managed to escape. Ward was charged in the hostage incident and while he was in police custody the INLA kidnapped his wife and children to prevent him from becoming an informant.

Ward was sentenced to 3 years in prison. He did not become an informant and never publicly admitted having released the hostages. Toward the end of his prison sentence Ward obtained a Republic of Ireland passport and on his release entered Canada as a visitor in December, 1985. He claimed refugee status in 1986. Under the procedures that were in effect at that time the Minister determined that Ward was not a Convention refugee. Ward applied for redetermination of his claim to the Immigration Appeal Board, as it was then known. The Board allowed the redetermination and found Ward to be a Convention refugee.

The Attorney General brought an application in the Federal Court to set aside the Board's decision, which decision was successful. The result of the Federal Court decision was that the appellant's case was referred back to the Immigration Appeal Board for reconsideration.

The Board again found Ward to be a Convention refugee. The Minister appealed the Board's decision to the Federal Court of Appeal, which set aside the Board's decision and the appellant, Ward, then appealed that decision to the Supreme Court of Canada.

International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states became engaged.

Ward was not only a national of the Republic of Ireland, but also of Great Britain. The onus of proof in a refugee proceeding is on the claimant and it is for the claimant to show a well-founded fear of persecution in all countries of which the claimant is a national. In this case Ward was a national not only of the Republic of Ireland, but

also of Great Britain and there was therefore a burden upon him to prove that he was a refugee from both countries before Canada's obligation could be engaged.

State complicity in persecution is not a prerequisite to a valid refugee claim. The claimant must establish a "well-founded fear". The claimant must be outside his or her country of nationality because of that fear and unable to avail himself or herself of its protection. Alternatively, the claimant must be both outside his or her country of nationality and unwilling to avail himself or herself of its protection by reason of that well-founded fear. If a state is able to protect a claimant, then his or her fear is not, objectively speaking, well-founded. Persecution under the Convention includes situations where the state is not an accomplice to the persecution, but is simply unable to protect its citizens.

Being unable to avail oneself of state protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance which prevents the country of nationality from extending protection. Protection by the country of nationality may also have been denied to the claimant. Such denial may confirm or strengthen the claimant's fear of persecution and may indeed be an element of the persecution. The term "unwilling" in the definition refers to refugees who refuse to accept the protection of the country of nationality. Where a person is willing to avail himself or herself of the protection of his or her home country, such willingness would be incompatible with a claim that he or she is outside that country owing to a well-founded fear of persecution. Whenever the protection of the country of nationality is available and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee. Ineffective state protection is encompassed within the concept of "unable" and "unwilling". In cases of "inability", protection is denied to the claimant, whereas when the claimant is "unwilling", he or she opts not to approach the state by reason of his or her fear on one of the enumerated bases. In either case, the state's involvement in the persecution is not a necessary consideration.

Where the existence of a fear is established and where the state's inability to protect is established, it is not assuming too much to say that the fear is well-founded. The burden of showing a state's inability to protect rests on the claimant and can only be discharged by the adducing of clear and convincing confirmation of this inability to protect. In this particular case the proof was unnecessary as representatives of the state authorities conceded their inability to protect the appellant, Ward. Nations should be presumed to be capable of protecting their citizens. Security of nationals is the essence of sovereignty. Absent a situation where the state apparatus has completely broken down, such as that recognized in Lebanon in the *Zalzali* case [1991] 3 F.C. 605, it should be assumed that the state is capable of protecting its nationals.

The appellant Ward justified his claim to refugee status on the basis of a well-founded fear of persecution at the hands of the INLA by reason of his membership in a particular social group, i.e., the INLA. A good working rule to determine the meaning of "particular social group" is set out in the test proposed in *Mayers v. Canada* (1992), 97 D.L.R. (4th) 729; *Acosta* 2986, 919850 WL 56042 (B.I.A.); and *Cheung v. M.E.I.*, [1993] F.C.J. No. 309 (Q.L.), Appeal No. A-785-91. Those cases identify three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and



- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The INLA did not meet these three tests and was therefore not a particular social group.

However, it is for the examiner to decide whether the Convention definition is met; usually there will be more than one ground for the well-founded fear of persecution. In this case the Court considered whether Ward had a well-founded fear of persecution for reasons of his political opinion. Ward believed that the killing of innocent people to achieve political change was unacceptable and thus his persecution by the INLA stemmed from that belief, which was held by the Supreme Court of Canada to be a political opinion. Any opinion on any matter in which the machinery of state, government and policy may be engaged is a political opinion. The political opinion need not have been expressed outright by the claimant and need not conform to the claimant's true beliefs. Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in political conviction.

The appeal was allowed. The decision of the Court of Appeal was set aside. The case was remitted back to the Immigration and Refugee Board so that it could determine whether Ward was also a refugee from Great Britain, his second country of nationality.

*Ling v. Canada (Min. of Employment & Immigration)* (1993), 64 F.T.R. 182.

The expression "a reasonable chance of persecution" has been held by the Appeal Division of the Federal Court to be an apt equivalent for a "well-founded fear of persecution".

The Court approved the following comments of MacGuigan J.A. in *Adjei v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 680, 7 Imm. L.R. (2d) 169, 57 D.L.R. (4th) 153, 132 N.R. 24 (Fed. C.A.):

The fear of persecution in the definition has a two-fold aspect. On the one hand, the applicant must experience a subjective fear. A man with great fortitude may not have a subjective fear of persecution until adverse circumstances are worse for him than for his less courageous fellow countryman; nevertheless such a fear must be present in the mind of the applicant for the definition of Convention refugee to be met. The appropriate test as to whether or not a subjective fear exists is that appropriate for determining the existence of other matters of fact in a case of this kind, namely balance of probabilities.

The second aspect is the object of element. The subjective fear of the applicant ... must have an objective basis.

The decision of the Board was unexceptionable, and not to be disturbed. Accordingly, the application to quash the decision of the Convention Refugee Determination Division was dismissed.

*Ghazizadeh v. Canada (Min. of Employment & Immigration)* (1993), 154 N.R. 236 (Fed. C.A.).

The whole concept of a refugee "sur place" requires an assessment of the situation in the applicant's country of origin after she or he has left it. The fact that the departure may have been perfectly legal is nothing to the point.



*Vakeesan v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-900-90, April 20, 1993.

The Court commented that it would not exercise its jurisdiction under paragraph 52(c) of the Federal Court Act because the evidence before the Board was not so clearly conclusive of the issue that the Board ought to declare the appellant a Convention refugee, nor was it clear that such a declaration was the only possible conclusion that the Board could reach. The Court referred to two of its own cases in determining when it would exercise its jurisdiction under paragraph 52(c). Those cases were *Nadarajah v. Canada (Min. of Employment & Immigration)*, [1992] 2 F.C. 394, 17 Imm. L.R. (2d) 1, 142 N.R. 161 (Fed. C.A.) and *Mahathmasseelan v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 29, 137 N.R. 1 (Fed. C.A.).

*Cheung v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 81, 153 N.R. 145 (Fed. C.A.).

In 1984 Ting Ting Cheung gave birth to a baby boy in the Peoples' Republic of China. She had another child in 1987 and came to the attention of the Family Planning Bureau in her native province. Shortly after the pro-democracy demonstrations in Beijing she came to Canada and claimed to be a refugee.

The first question was whether women in China who have more than one child and are faced with forced sterilization constitute a social group within the meaning of the definition of "Convention refugee". The Court indicated that the following criteria provide a useful basis for consideration in constructing a test for being a particular social group:

(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness, and solidarity or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.

The Court concluded that women in China who have one child and are faced with forced sterilization satisfy enough of the above criteria to be considered a particular social group. This did not mean that all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who also have a well-founded fear of persecution as a result of membership in that social group who can claim such status.

The next question was whether forced or strongly coerced sterilization in the context of China's one-child policy constituted persecution. The Immigration and Refugee Board had concluded that forced sterilization in that context was not persecution. The Court disagreed.

The Court noted that forced sterilization of women was a violation of Articles 3 and 5 of the United Nations Universal Declaration of Human Rights. This declaration was adopted and proclaimed December 10, 1948 by the General Assembly of the United Nations.

Karen Lee Cheung was the second child, whose birth was contrary to the one-child policy. The Court found that the minor could also claim the benefit of Convention

refugee status on the principle of family unity. Finally, there being no problems as to the credibility of the adult claimant, nor any factual questions that needed to be resolved by the Board, the Court exercised its discretion under subsection 52(c)(i) of the Federal Court Act and declared both appellants to be Convention refugees.

*Canada (Min. of Employment & Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130, 99 D.L.R. (4th) 334, 150 N.R. 232 (Fed. C.A.).

The respondent was a Philippine national, who served in his home country as a policeman. He fled because he had been marked for death by a communist terrorist guerilla group and he feared for his life. The Refugee Division found him credible and held that he did have a well-founded fear of persecution by reason of his political opinion.

The Refugee Division failed to address the question of whether the respondent was unable or unwilling to avail himself of the protection of the Philippines. Where the claimant is himself an agent of the state, it makes no sense to speak of him as being unwilling to seek the state's protection. The claim can only succeed if he shows that he is unable to do so. The burden of showing that one is not able to avail oneself of the protection of one's own state is not easily satisfied. The test is an objective one and involves the claimant showing either that he is physically prevented from seeking his government's aid or that the government itself is in some way prevented from giving it. No government that makes any claim to democratic values can guarantee the protection of all its citizens at all times. Thus it is not enough for a claimant to show that his government has not always been effective at protecting persons in his particular situation. Where the state is so weak and its control over all or part of its territories so tenuous as to make it a government in name only, a refugee may justly claim to be unable to avail himself of its protection. Situations of civil war, invasion or the total collapse of internal order will normally be required. The Refugee Division having failed to address this question, its decision was quashed and the matter referred back to a differently constituted panel of the Board for a new hearing.

*Re Manikkam* (1992), 17 Imm. L.R. (2d) 236 (Imm. & Ref. Bd. (Ref. Div.))

The refugee claimant had pleaded guilty to possession of \$7,500,000 worth of heroin. The Board members found that the claimant had a well-founded fear of persecution in Sri Lanka. They found as well that he should be excluded from protection under the Convention because possession of heroin for the purposes of trafficking was included in Article 1F(c). That is, the claimant was a person with respect to whom there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations.

*Canada (Min. of Employment & Immigration) v. Mehmet*, [1992] 2 F.C. 598, 141 N.R. 253 (C.A.).

The respondent, Mehmet, presented a claim for refugee status to a first-level tribunal. The Minister's representative asked members of the first-level tribunal to consider the possibility of applying the exclusions contained in Sections E or F of Article 1 of the United Nations Convention. The adjudicator and member of the Refugee Division felt that they should decline to consider this matter. They recognized that the respondent's claim had the necessary credible basis and decided that only the body empowered to decide whether an individual is a Geneva Convention refugee has jurisdiction to deny the benefits associated with that status on the basis of the exclusion clauses described

in Sections E and F of Article 1 of the 1951 Convention. The Minister's application pursuant to section 28 questioning this decision was dismissed.

*Urbanek v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 153, 144 N.R. 77 (Fed. C.A.).

The purpose of the refugee determination system is to provide a safe haven to those who genuinely need it and not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way.

*Orelien v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 592, 15 Imm. L.R. (2d) 1, 135 N.R. 50 (C.A.).

Canada's obligations in the area of refugees stem from the 4th Geneva Convention of August 12, 1949, and protocol due to the Geneva Convention of August 12, 1949, both approved by Acts of Parliament (Geneva Conventions Act, R.S.C. 1985, c. G-3, s. 2, as am. S.C. 1990, c. 14, s. 1), as well as a customary norm of temporary refuge. To return a person to Haiti in the circumstances that presently exist and have existed at relevant times in this case would have violated Canada's obligations under the Convention, the protocol and the customary norm of international law prohibiting the forceable repatriation of foreign nationals who have fled generalized violence and other threats to their lives and security arising out of internal armed conflict within their state of nationality. The Convention, the protocol and the customary norm of international law have the force of domestic law in Canada and can be enforced in the courts of Canada at the suit of a private individual. The intention to execute a deportation order which if executed would breach those laws does not colour the process under the Immigration Act by which a person from such a country may be ordered deported. This is not to denigrate the importance of the Convention, the protocol and the customary norms of international law. It would be a grave and justiciable matter if Canada were to execute deportation orders in circumstances which breached obligations under international law and put the life, liberty or security of persons in peril.

*Ramirez v. Canada (Min. of Employment & Immigration)* (1992), 85 D.L.R. (4th) 173, 135 O.R. 390 (Fed. C.A.).

The Refugee Division determined that the appellant was not a Convention refugee even though he had a well-founded fear of persecution by reason of his political opinion. The appellant was found to be excluded from the definition by virtue of Section F of Article One of the United Nations Convention relating to the status of refugees. The appellant had engaged in criminal acts which were either war crimes or crimes against humanity.

The Court determined that the phrase "serious reasons for considering" appearing in Section F of Article One established a lower standard of proof than the balance of probabilities. The Court saw no great difference between the phrases "serious reasons for considering" and "reasonable grounds to believe" appearing in sections 19(1)(j) and 27(1)(g) and (h).

There was no issue as to which party bore the onus. The government must establish that it has reasonable grounds for excluding claimants and accordingly bore the burden of establishing serious reasons for considering that the claimant was excluded by Section F of Article One. Finally, the Court concluded that accomplices as well as principal



actors are included in the exclusion. In order to be an accomplice the individual must be shown to be a personal and knowing participant in the crimes against peace, war crimes or crimes against humanity which are referred to in Section F. The appellant was by his own evidence an accomplice in acts which were either war crimes or crimes against humanity and accordingly his appeal was dismissed.

*Rasaratnam v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 706 (C.A.).

The internal flight alternative (IFA) concept is inherent in the Convention refugee definition. In order to conclude an IFA exists the Board must be satisfied on a balance of probabilities that there is no serious possibility of a claimant being persecuted in the part of the country which is viewed upon as the internal flight alternative. Secondly, conditions in that part of the country to which the IFA applies must be such that it would not be unreasonable for the claimant to seek refuge there. Thirdly, the determination of whether there is an IFA is integral to the determination of whether the claimant is a refugee. Fourthly, the claimant is not expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question of an IFA must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.

In this case, the Board did not err in concluding the appellant was not a Convention refugee because the appellant could have lived free from persecution in Colombo, Sri Lanka.

*Canada (Min. of Employment & Immigration) v. Obstoj*, [1992] 2 F.C. 739, 142 N.R. 81 (C.A.).

The Minister applied to set aside a credible basis determination. The first-level tribunal found that given the present day change of circumstances in Poland there was no realistic possibility of the respondent suffering persecution if she would return. They found, however, that the respondent fell under the provisions of section 2(3) of the Immigration Act and that there were compelling reasons for her refusing to avail herself of the protection of Poland and that therefore her claim had a credible basis. The three judges of the Court of Appeal that heard the matter gave three different judgments. Hugessen J. ruled that since the Refugee Division, when conducting the hearing into the claim for refugee status, was able to hear evidence and consider questions raised by section 2(3), the credible basis tribunal, when deciding whether or not there is credible or trustworthy evidence on which the division could decide in a claimant's favour, is likewise able to consider such evidence. Subsections 2(2) and 2(3) were found to deal not only with the loss of a refugee status which had already been acquired, but also to have been incorporated into the definition of a Convention refugee by virtue of paragraph (b) of the definition.

Section 2(3) extends to anyone who has been recognized as a refugee at any time, even long after the date of the Convention, and it should also be read as requiring Canadian authorities to give recognition to refugee status on humanitarian grounds to a special and limited category of persons, that is, those persons who have suffered such appalling persecution that the experience alone is a compelling reason not to return them even though they may no longer have reason to fear further persecution.

Desjardins J.A. was of the view that paragraph (b) contained in the definition of

a Convention refugee was an integral part of that definition and that a claimant must meet the requirements of both paragraphs (a) and (b) at the time that status is claimed and continuously thereafter. There is a constant relationship between the cases mentioned in paragraph (b) and the requirement of a well-founded fear mentioned in paragraph (a). Subsection 2 referred to in paragraph (b) contains 5 categories. Paragraphs (a), (b), (c) and (d) presuppose the case of an individual who does something contrary to the idea of a Convention refugee. Such an individual could then never claim that his or her fear was well founded. Such a person ceases to be a refugee first because of the requirements in paragraph (b) of the definition, and secondly because the fear of such a person is not well founded. Paragraph 2(2)(e) does not deal with an act committed by a claimant which conflicts with the idea of a well-founded fear, but rather with changes which occurred in the country of origin so that the reasons for the fear have ceased. Such a claimant does not meet paragraph (b) of the definition and further his fear is no longer well-founded as required by paragraph (a) of the definition. Subsection 2(3) creates justification which excludes the application of section 2(2)(e). While the fear of a person described in section 2(3) is not well-founded Parliament intended to recognize that such persons could claim refugee status despite this fact. Such a claim could only initially be made at a first-level tribunal, and accordingly a first-level tribunal can consider whether there is credible evidence of the justification set out in section 2(3).

Pratte J.A. dissented and would have allowed the application and ruled that a foreigner who no longer has a reason to fear persecution in his country may not be determined to be a Convention refugee for the sole reason that the persecution he suffered in the past justifies his refusal to avail himself of the protection of that country.

*Zalzali v. Canada (Min. of Employment & Immigration)*, 14 Imm. L.R. (2d) 81, 126 N.R. 126, [1991] 3 F.C. 605 (C.A.).

The appellant, a Lebanese national, claimed he was persecuted on account of his nationality, political opinion and membership in a particular social group. In most cases of claims for refugee status, the State while it may not itself be the agent of persecution, makes itself an accomplice by tolerance or inertia. It is then possible to speak in terms of persecution attributable to the State and to conclude that the refugee claimant had good reason to be unwilling to claim protection which the State was, in all likelihood, not going to give him. There can be persecution within the meaning of the convention and the Immigration Act where there is no form of guilt, complicity or participation by the State. The definition of a refugee refers to "the fear of persecution without saying that this persecution must be by the government." The natural meaning of the words "is unable" assumes an objective inability on the part of the complainant and the fact that "is unable" is not qualified by "reason of that fear" confirms that the inability in question is governed by objective criteria which can be verified independently of the fear experienced. Seeing a connection of any kind between "is unable" and "complicity by the government" would be a misreading of the definition. Persecution by someone other than the government is possible when the government is unable to offer protection. There are several reasons beyond the person's control why he or she might be unable to claim the protection of the State. One of those reasons is the non-existence of a government to which that person may resort. In this case, the decision of the Refugee Division was set aside and the matter was remitted back for a re-hearing in accordance with the reasoning of the Court.

*Editor's Note:* The cases which discuss the phrase "is unwilling" are *Rajudeen* (1984), 55 N.R. 129; *Surujpal* (1985), 60 N.R. 73; *Satiacum* (1985), 99 N.R. 171.

*Hilo v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 199, 130 N.R. 236 (Fed. C.A.).

The Refugee Division was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The Board's credibility assessment was defective because it was couched in vague and general terms. The claimant had only attended informal meetings of a political group inside Syria. The Refugee Division viewed this group as loosely knit with apparently charitable aims, no official title or status and noted further that the claimant was only 14 years of age at the time of his attendance. The Court found that characterizing the group in this way was irrelevant. The Syrian authorities had sought to persecute the appellant because of his perceived political opinion. The proper test for evaluating political activities is not whether the division or members considered that the appellant had engaged in political activities but whether the ruling government of the country from which he claimed to be a refugee so considered his conduct.

*Hoang v. Canada (Min. of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35, 120 N.R. 193 (Fed. C.A.).

The appellant was ordered deported because he was a permanent resident who had been convicted of an offence for which a term of imprisonment of more than 6 months had been imposed; he had also been convicted of an offence for which the maximum term was 5 years or greater. The appellant had come to Canada as a stateless person from Vietnam and had been determined by the Minister in 1986 to be a convention refugee. The Court noted that the Immigration Appeal Board (which had decided this matter) correctly determined that its jurisdiction is only over whether a person should be removed from Canada and not as to the country of removal. Until the issue of deportation is settled, the Minister cannot make a decision as to the country of removal. Thus a statement by the Minister's representative as to the Minister's disposition to deport the appellant to Vietnam was not taken as a formal expression of the Minister's decision since the Minister was not, at the date of that statement, empowered to make the decision.

The Court determined that in dealing with the "double jeopardy" provisions of section 11(h) of the Charter deportation was not to be seen as a punishment of the person deported but a protection of those who remained. Further, deportation for serious offences affects neither section 7 nor section 12 of the Charter of Rights since it is not to be conceptualized as either a deprivation of liberty or a punishment. Finally, the Court noted that with respect to Canada's international obligations the United Nations convention relating to the status of refugees contained an exception to the prohibition against refoulement where the deportee had been convicted in the country where he was making the refugee claim of a particularly serious crime. The Court noted that the phrase "particularly serious crime" and "danger to the community" were not defined in the convention and therefore presumed that Parliament responsibly fulfilled its obligation when it enacted the Immigration Act.

Accordingly the appellant's appeal was dismissed.



*Canada (Min. of Employment & Immigration) v. Akl* (1990), 140 N.R. 323 (Fed. C.A.).

The respondent was a national of Lebanon and possessed a Brazilian passport. The respondent established that he had a credible basis for claiming to be a convention refugee fearing persecution in Lebanon, however, the respondent indicated that he did not wish to go and live in Brazil although he did not fear persecution at the hands of the Brazilian authorities. The decision of the adjudicator and the member of the Refugee Determination Division that the respondent had a credible basis for his claim was quashed. The refugee claimant must establish that he is unable or unwilling to avail himself of all of his countries of nationality if his claim is to be upheld.

*Re Jugpal* (1989), 10 Imm. L.R. (2d) 109 (Imm. R.B.).

This case provided an example of how the Immigration and Refugee Board analyze a determination of a claim to refugee status. The Board reviewed the evidence and indicated that it found the evidence credible. Specifically, the Board found that the testimony was consistent, straight forward, and sufficiently detailed to provide a plausible and coherent account of the basis of the claimant's fear and, further, that the testimony was not exaggerated. Further, the claimant was able to substantiate specific facts, including his own identity, with documents that were submitted to the Board. In evaluating the well-founded fear of persecution, the Board took into consideration the fact that the persecution suffered by the claimant in the past was sufficient to substantiate his claim to a well-founded fear of persecution. The Board took into account the fact that the claimant was arrested and re-arrested and he claimed to have been tortured. Objective evidence was presented which attested to the circumstances in his country to the effect that any young Sikh could be unjustly accused, detained or killed. Of particular interest was a letter signed by three American congressmen underlining the fact that human rights are in a decline in the Punjab. The Board decided that this was not a case of prosecution but rather a case of persecution because the claimant was tortured at the time of his arrest, he was held 5 months before being released and, after being released, he was again investigated by the police and accused of harbouring terrorists and deserters in his home. Further, the claimant was able to produce a letter from the mayor of his village indicating that his father had been arrested and was being held in his place. The father was not a supporter of the same causes as the claimant.

*Adjei v. Min. of Employment & Immigration*, [1989] 2 F.C. 680, 7 Imm. L.R. (2d) 169, 57 D.L.R. (4th) 153, 132 N.R. 24 (C.A.).

This application focuses on the proper interpretation of the definition of Convention refugee. An accurate way of describing the requisite test is in terms of "reasonable chance": is there a reasonable chance that persecution would take place were the applicant returned to his country of origin. There need not be more than a 50 per cent chance that persecution will occur (that is, a probability). On the other hand, there must be more than a minimal possibility of persecution. This application was allowed because the Board, in describing the test set out in the definition, stated that it was whether there was a reasonable chance or "substantial grounds" for thinking that the persecution may take place. The use of the term "substantial grounds" introduced an element of ambiguity into the Board's formulation of the correct test under the refugee definition. Accordingly,

the Board's decision was set aside and the matter remitted back to the Board for reconsideration.

*Surujpal v. Min. of Employment & Immigration* (1985), 60 N.R. 73 (Fed. C.A.).

The applicant brought a section 28 application to quash a decision of the Immigration Appeal Board finding that the applicant was not a Convention refugee. The decision of the Immigration Appeal Board was quashed because the evidence disclosed that the police were complicit in the broader sense in the persecution and harassment of the applicant. It is not required that State participation in persecution be direct; it is sufficient that it is indirect provided that there is proof of State complicity.

*Rajudeen v. Min. of Employment & Immigration* (1984), 55 N.R. 129 (Fed. C.A.).

The definition of Convention refugee does not include a definition of persecution. "Persecute" was defined by reference to a dictionary as "to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship." "Persecution" was defined as "a particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source."

There is a subjective and objective component necessary to satisfy the definition of Convention refugee. The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

In determining whether refugee status has been extended to cover a particular case, reference should be made to the expression of underlying policy in section 3(g) of the Act. To satisfy the definition, the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state toward the individual or in the state knowingly tolerating the behaviour of private citizens or refusing or being unable to protect the individual from such behaviour.

*Oyarzo v. Min. of Employment & Immigration*, [1982] 2 F.C. 779 (Fed. C.A.).

The essential question for the Immigration Appeal Board on an application for redetermination was whether the evidence disclosed a likely case of a well-founded fear of persecution for political opinion. While fear was subjective, whether it was well-founded was objective. Incidents in the distant past were part of the whole picture of the applicant's condition and could not be disregarded entirely as a basis for a well-founded fear of persecution. Acts directed against the applicant falling short of arrest or detention could amount to persecution and could form a basis, along with other incidents, of a well-founded fear of future persecution.

*Musial v. Min. of Employment & Immigration*, [1982] 1 F.C. 290, 38 N.R. 55 (Fed. C.A.).

The applicant was a Polish seaman who left his ship in Vancouver. The Court found that his fear of punishment for refusal to serve in the military in Poland was well founded. However, army deserters and conscientious objectors were not dealt with specifically in the definition "Convention refugee". Such cases should be considered on their merits, including the applicants' motives for engaging in conduct which they fear will attract punishment. This applicant's fear of being punished for refusing to serve in Afghanistan

with the Polish army, if called upon to do so, was not sufficient to differentiate his case from that of any other draft evader. Thus, the Immigration Appeal Board was quite right in ruling that there were not reasonable grounds to believe that the applicant's claim for Convention refugee status could be established.

*Galindo v. Min. of Employment & Immigration*, [1981] 2 F.C. 781 (Fed. C.A.).

The decision of the Immigration Appeal Board that the testimony of the applicant concerning his detention and torture was exaggerated and, therefore, that the appeal should be dismissed, was overturned because the Board had ignored the evidence of independent medical witnesses about the nature of the physical and emotional disabilities suffered by the applicant. Those witnesses found these disabilities to be compatible with the history of torture and detention related by the applicant. Further, the decision was set aside because the Board relied on certain information that it had obtained in other hearings relating to Chile. This information was adverse to the applicant. It was not the sort of information of which judicial notice could be taken. It was information which the applicant might well be in a position to contest and fairness required that the applicant, therefore, be given an opportunity to respond to the information before it was taken into consideration by the Board.

*Re Naredo and Min. of Employment & Immigration* (1981), 130 D.L.R. (3d) 752, 40 N.R. 436 (Fed. C.A.).

The Federal Court held that the Immigration Appeal Board erred in imposing upon the applicant and his wife the requirement that they be subject to persecution. The statutory definition requires only that they establish a well-founded fear of persecution.

*Re Inzunza and Min. of Employment & Immigration* (1979), 103 D.L.R. (3d) 105 (Fed. C.A.).

Whether a person has engaged in political activity must be determined by considering the opinion of the government of the country of his nationality and not by the Immigration Appeal Board's consideration of whether the applicant has engaged in such activity.

*Astudillo v. Min. of Employment & Immigration* (1979), 31 N.R. 121 (Fed. C.A.).

The Court reaffirmed that in interpreting political activities the crucial test is not whether the Immigration Appeal Board considers that the applicant engaged in political activities, but whether the ruling government of the country from which the applicant claims to be a refugee so considers his conduct.

*Re Araya*, Imm. App. Bd., Montreal, Doc. No. 76-1126, January 6, 1977.

The Immigration Appeal Board ruled that harassment of the wife because she knew about her husband's political activities and movements constituted persecution of a political nature.

### ***Deportation order***

*Moore v. Min. of Manpower & Immigration*, [1968] S.C.R. 839, 69 D.L.R. (2d) 273 (S.C.C.).

A deportation order was held to be valid in form under the Immigration Act, R.S.C. 1952, notwithstanding the fact that it did not name the country to which the person



named was to be deported. The Court also noted that it would not be improper for the order to specify that country.

### ***Deputy Minister***

*Ali v. Min. of Manpower & Immigration*, [1976] 1 F.C. 185, 11 N.R. 617 (Fed. C.A.).

Where the face of a direction under the Immigration Act, R.S.C. 1952, was signed by someone who purported to do so for the director of the immigration branch, there was then created a presumption that such person had the authority that he purported to exercise.

### ***Employment***

*Georgas v. Min. of Employment & Immigration*, [1979] 1 F.C. 349, 23 N.R. 437 (Fed. C.A.).

On the facts of this case, there was evidence from which an adjudicator could conclude that the applicant had engaged in employment. However, not all work performed by a visitor for a relative with whom he or she is staying, and for which the relative would have to pay compensation if he or she chose to have it done by a stranger, falls within the definition of employment. Whether or not the work done is employment depends upon the nature of the work and the circumstances.

### ***Immigrant***

*Reyes de Jesus v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 217 (Imm. App. Bd.).

This was an appeal from the refusal of a sponsored application for landing. The appellant was seeking to sponsor his mother. The application was refused on the basis that the mother had not satisfied the immigration officer that she complied with the definition of "immigrant" given in section 2(1) of the Immigration Act. This decision was based upon previous statutory declarations, which the mother had filed when she was seeking visitor's visas to come to Canada. These declarations denied an intention to reside permanently in Canada. This was found to be unfair because the declarations from the previous applications, upon which the officer relied, were not raised with the mother when she was interviewed. The Board found that it was the interviewing officer's duty to consider the mother's intention at the time of the interview and to allow her to explain the previous declarations. The Board also suggested that it would be sufficient if the mother's intention to reside permanently in Canada was formulated after the interview, which resulted in her application being rejected, but before the hearing of the sponsor's appeal.

**Investor**

*Chen v. Canada (Min. of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 290, 65 F.T.R. 73.

The applicant submitted an application for landing pursuant to the Investor class category and was refused by a visa officer.

The applicant was a graduate in civil engineering. Since graduation he worked full-time in the Soil and Water Conservation Bureau of the Department of Agriculture of Taiwan Province. In 1977 the applicant purchased land in Taiwan for \$500,000 Cdn. for use as a commercial orchard. The applicant personally performed sloping and contouring of the land and designed and built an irrigation system for it. The land is now used to grow oranges and olive trees. The applicant hired a manager to deal with farm operations. The farm produces approximately \$60,000 Cdn. per year profit and the applicant owned the farm at the time of this application. The officer concluded that the applicant had no experience in operating, controlling or directing a commercial business and relied upon the fact that the applicant had hired a manager to be responsible for the operation of the farm.

The decision by the officer that the applicant did not operate the farm could not be criticized. However, the evidence did not disclose that the visa officer had properly directed herself to the question of whether the applicant controlled the farm or whether he directed it. There was nothing in the material to indicate that the officer had addressed anything other than whether the applicant had experience in operating the farm.

The definition of Investor in the Immigration Regulations requires only that the applicant demonstrate that he has successfully either operated or controlled or directed a business or commercial undertaking. The words in context are disjunctive. It is therefore incumbent on a visa officer to assess each aspect separately to determine whether an applicant falls under at least one of the criteria. The visa officer concluded from the fact the applicant was not involved in the operation of the farm that he also did not control or direct it. In coming to this conclusion she failed to give a distinct meaning to each of the words. The fact that the applicant owned the farm and earned the profits and would presumably be responsible for the losses at least *prima facie* suggested that he must have had some involvement in controlling or directing it. This was a matter for the visa officer to determine by addressing the issues of control and direction distinctly and specifically. The failure of the officer to consider each criteria separately and make an assessment in respect of each constituted an error in law.

The Court went on to note that when the visa officer became concerned that the applicant might not qualify in the Investor class, she should have questioned him specifically on each of the criteria separately. To simply express to the applicant a concern in a general way and then expect a meaningful response is not consistent with the requirement of procedural fairness. The visa officer is not required to conduct a seminar with each applicant as to the requirements of the Immigration Act or Regulations or indeed to phrase questions always using specific words or formulas. However, where the requirements to be met under the Act or Regulations are fairly straightforward and the visa officer has a concern that an applicant might not qualify, it does not place too great a burden on the visa officer to address each requirement specifically and illicit answers such that a clear assessment can be made.

The decision of the visa officer was set aside and the matter was returned for

redetermination in accordance with the reasons of the Court. The redetermination could be made by the same visa officer or by a different one at a location convenient to the applicant.

### ***Permanent resident***

*Han v. Min. of Employment & Immigration* (1984), 6 Admin. L.R. 25, 52 N.R. 274 (Fed. C.A.).

A person granted permanent resident status who fails to comply with the condition attached to that status, namely that he marry within 90 days, is, nevertheless, a permanent resident notwithstanding his failure to comply with this condition.

*Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273, 110 D.L.R. (3d) 126 (Fed. C.A.).

A permanent resident who has remained out of Canada for more than 183 days and who has been found by an adjudicator to have ceased to be a permanent resident has a right to appeal that question to the Immigration Appeal Board under section 72 [s. 70] of the Immigration Act.

### ***Visa***

*Canada (Min. of Employment & Immigration) v. De Decaro*, [1993] 2 F.C. 408, 103 D.L.R. (4th) 564, 155 N.R. 129 (C.A.).

In October 1988 a visa officer issued an immigrant visa to Ignazio De Decaro. He also issued an immigrant visa to two dependants who were to accompany Mr. De Decaro, namely the respondent and her daughter. Ignazio De Decaro died before coming to Canada. The respondent did come and arrived at Dorval on July 11, 1989 accompanied by her daughter and another child, who was born in the U.S. after Ignazio De Decaro's death. This child had never obtained a visa to Canada.

The respondent then applied for landing for herself and her two children. This was denied on the ground that the respondent's admission contravened section 19(2)(d) of the Immigration Act because the respondent did not meet the requirements of section 9(1) of the Act.

The adjudicator found that when the respondent applied for admission to Canada, she held a valid immigrant's visa since her visa had not been revoked by the proper authorities. The adjudicator found that the respondent's husband's death did not automatically invalidate the visa. Further, the adjudicator found that there was no need to refer to section 12 of the Regulations because that provision did not enact a condition of admission, consequently its infringement did not mean the respondent could not be admitted.

The Appeal Division of the I.R.B. dismissed the Minister's appeal on the basis that the respondent, before appearing at a port of entry, had duly obtained an immigrant visa which had never been revoked or cancelled by the proper authorities and thus the respondent had the right to be admitted to Canada unless she was inadmissible on some other ground than the lack of a valid visa.

The Minister's appeal to the Court of Appeal was allowed. Pratte J.A. held that the definition of "accompanying dependant" illustrated that the visa issued to a person



in this class was of a very special type which was issued solely to enable its holder to accompany or follow another person to Canada. The holder of such a visa who applied for admission without the other person accompanying or preceding him or her into Canada did not therefore meet the requirements of section 9(1) of the Act.

Further, after her husband's death the respondent became inadmissible by virtue of section 12 of the Regulations. Her marital status had changed since she obtained her visa and in order to be admitted to Canada she had to establish not only that she was eligible, but also that she met all the conditions for obtaining a visa. The respondent never discharged this burden of proof.

Marceau J.A. agreed that the decision of the Appeal Division should be set aside. He saw no reference in the Act or Regulations to visas which become invalid, are revoked or become ineffective. The technique in his view used to cover cases of changes in the immigrant's status between the time the visa is issued and the time he or she arrives at the Canadian border is contained in section 12 of the Regulations. In his view, issuing an immigrant visa is not the granting of landing. Such issuance simply means that the visa officer has formed the opinion that the applicant meets the requirements of the Act and Regulations for admission to Canada. The visa is evidence of a conclusion by an immigration officer whose function is to determine from outside Canada whether applicants are admissible and that conclusion will usually be accepted by his or her colleague at the port of entry. However, the rule is still that a foreign national arriving in Canada with a view to residing here must satisfy the immigration officer of his admissibility at the port of entry. Section 12 of the Regulations imposes on an immigrant a duty to disclose any change in the facts which may have influenced the issuing of the visa and if there has been such a change, it requires the immigrant to meet new requirements. The visa is not void, but the visa in itself does not confer the right of entry. It is the new requirements of section 12 of the Regulations that must be met.

In Marceau J.A.'s view the respondent could not establish that she met the requirements of section 12 since she was granted a visa in consideration of her husband's presence. The adjudicator accordingly was wrong to think that she met the conditions of admission set out by the Regulation and the Appeal Division could not confirm the adjudicator's finding on the ground that the Minister had not discharged the burden of proving that the respondent was inadmissible or that her visa had been cancelled, as the Minister was under no burden of proof and cancellation of a visa as a concept does not exist.

Given that the Court intended to allow the appeal, it then had to consider section 73(3). The majority was of the view that the respondent before her husband's death possessed a valid visa. However, after that death it was impossible for the condition attached to the visa to be performed so that the visa ceased to have any validity. Accordingly, section 73(3) conferred no right of appeal to the Appeal Division on the respondent.

Marceau J.A. was of the view that the respondent was in possession of a valid visa and that the matter should be returned to the Appeal Division as it was still under a duty to consider whether on compassionate or humanitarian grounds the respondent should not be removed from Canada.

*Canada (Min. of Employment & Immigration) v. Wong* (1993), 153 N.R. 237 (Fed. C.A.).

A Canadian citizen made a sponsorship application for her father and sister, the latter in the category of the father's single dependant daughter. Before the issuance of the immigration visas, the father died. Unaware of this event, Canadian immigration authorities issued visas to both sponsorees. At the point of entry to Canada, the sponsoree daughter initially lied to a Canadian immigration officer, but ultimately produced her father's death certificate. On inquiry she was ordered excluded.

The Appeal Division held that it had jurisdiction to hear the appeal since at the time of landing the sponsoree-sister was in possession of a valid immigrant visa and went on to exercise its compassionate discretion in her favour.

Where an element upon which the issuance of a visa is based subsequently ceases to exist and where the principal reason for the issuance of a visa ceased to exist before its issuance, such a visa cannot be said to be a valid immigrant visa.

The appeal was allowed and the Board's decision set aside for want of jurisdiction.

*De La Cruz v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1180-88, February 8, 1989.

The applicants were citizens of the Philippines. They applied for permanent residence in Canada at the Canadian Consulate General in San Francisco. The applicants were scheduled to be interviewed in San Francisco; however, their applications for tourist visas to the United States were refused by the United States Embassy in Manila. They therefore decided to apply at the Consulate in Toronto for a United States visa.

However, the application for visitors' visas made at the Canadian Embassy in Manila was refused. This decision was upheld. The duty of the visa officer is to accord proper consideration to any application. The officer is not required to issue a visitor's visa unless convinced that the applicant fulfills the legislative requirements. Once the visa officer turns his mind to the issue and disposes of the application for visitors' visas, there remains no duty to be performed enforceable by *mandamus*.

To succeed on an application for *certiorari*, the applicants must do more than establish the possibility that the Court might have reached a different conclusion than the visa officer. There must be either an error of law apparent on the face of the record or a breach of the duty of fairness appropriate to this essentially administrative decision. It is not improper for the visa officer to refuse the visitors' visas on the basis of an outstanding application for permanent residence. It is the intent of the applicant that is properly the focus of the visa officer's examination. No policy dictates refusal simply because the applicants intend to apply for United States visas. Further, the officer had not based his decision solely on the refusal of United States officials to grant the applicants' request for visas to the United States. Accordingly, the decision of the visa officer was upheld.

*Min. of Employment & Immigration v. Mercier*, Imm. App. Bd., Montreal, Doc. No. 79-1243, September 16, 1980.

The Board held that a visa is no more than a stamp on a piece of paper issued outside of Canada which may give the holder a colour of right to come into Canada, either as a visitor or an immigrant, as the case may be, but no more.

*Min. of Employment & Immigration v. La Rose*, Imm. App. Bd., Toronto, Doc. No. 79-9284, November 28, 1979.

The issue in this case was whether a stamp appearing on page 9 of the respondent's passport was a valid visa. The Board held that the stamp was likely made on the passport by a visa officer. However, the Board held that section 72 [s. 70] of the Immigration Act when it makes reference to a "valid visa" is referring to either a non-immigrant visa authorizing entry into Canada or an immigrant visa authorizing admission as a permanent resident.

### **Subsection (2)**

*Penate v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 171.

For digest, see section 2, subheading *Subsection (1), Convention refugee, supra*.

*Hlavaty v. Canada (Min. of Employment & Immigration)* (1993), 22 Imm. L.R. (2d) 176, 69 F.T.R. 259.

For digest, see section 2, subheading *Subsection (1), Convention Refugee, supra*.

*Villalta v. Canada (Solicitor General)* (1993), 68 F.T.R. 304.

For digest, see section 2, subheading *Subsection (1), Convention Refugee, supra*.

*Canada (Min. of Employment & Immigration) v. Obstoj*, [1992] 2 F.C. 739, 93 D.L.R. (4th) 144, 142 N.R. 81 (C.A.).

For digest, see section 2, subheading *Subsection (1), Convention refugee, supra*.

### **Subsection (3)**

*Hassan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-653-92, May 4, 1994.

The respondent conceded that the Board had erred in this case. However, counsel for the applicants was of the view that the panel had erred in its interpretation of section 2(3) of the Immigration Act and that if it had not been for this error the applicants would have been found to be Convention refugees.

Before the Court will refer a matter back for redetermination in accordance with a direction that the applicants be found to be Convention refugees, the following circumstances must apply:

1. the evidence must be so clearly conclusive that the only possible conclusion is that the claimant is a Convention refugee;
2. the sole issue to be decided must be a pure question of law which will be dispositive of the case;
3. the legal issue must be based on uncontroverted evidence and accepted facts; and
4. there must be no factual issues which involve conflicting evidence which are central to the claim.

To require that before section 2(3) could apply there would have to be a Convention refugee determination in respect of an applicant would make the application of section



2(3) dependent on timing alone. Section 2(3) does not require an on-going fear of persecution. It applies to only a tiny minority of present day claimants who can demonstrate that they have suffered such appalling persecution that their experience alone is a compelling reason not to return them to the country in which they suffered the persecution. Section 2(3) only applies to extraordinary cases in which the persecution is relatively so exceptional that even in the wake of changed circumstances it would be wrong to return refugee claimants. The Court did not direct that on a rehearing of the matter the Board find the applicants to be Convention refugees. The Board with its experience and expertise was best able to assess whether, having regard to the special and limited application of section 2(3), the applicants fell within its ambit.

*Arguello-Garcia v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 285, 64 F.T.R. 307, 70 F.T.R. 1.

The Refugee Division found the applicant not to be a Convention refugee. The Board erred in law when it found that the facts did not amount to previous persecution. The Court noted that it had accepted a broad range of harassment and ill treatment as constituting persecution and, furthermore, that neither deprivation of physical liberty nor physical mistreatment were essential elements of persecution.

The Board, notwithstanding its findings that there was no persecution, found that there had been a change of circumstance in El Salvador. The second issue before the Court was whether the applicant fell within the special or limited category of persons to which section 2(3) of the Immigration Act applies. (Section 2(3) is based on a general humanitarian principle which permits a person who has suffered serious past persecution to retain or obtain Convention refugee status despite fundamental changes in his or her country of origin.)

The Court referred to the Concise Oxford Dictionary of Current English, Clarendon Press, Oxford, 1990 definition of atrocious and appalling. Atrocious was defined as very bad or unpleasant or alternatively extremely savage or wicked. An atrocity was defined as an extremely wicked or cruel act, especially one involving physical violence or injury. Appalling was defined as shocking, unpleasant or bad.

In this case, the torture and sexual assault experienced by the applicant qualified as atrocious and appalling acts as defined above. The right not to be subject to torture and cruel, inhuman and degrading treatment is a fundamental right which enjoys the highest international protection.

Further, there was ample evidence before the Board to show that the applicant continued to suffer severe psychological hardship as a result of the very serious persecution which he and his family members suffered in El Salvador. A psychiatric report entered in evidence stated that the applicant was suffering from post traumatic stress disorder, related to his personal and family history of violent persecution, torture and massacre. The finding by the Board that the applicant did not fit within the criteria set out in section 2(3) was on a misconstruction of the applicable test and constituted an error in law.

The application was granted and the matter returned to a differently constituted panel of the IRB to reconsider the evidence in accordance with the reasons of the Court.

*Canada (Min. of Employment & Immigration) v. Obsoy*, [1992] 2 F.C. 739, 93 D.L.R. (4th) 144, 142 N.R. 81 (C.A.).

For digest, see section 2, subheading *Subsection (1), Convention refugee, supra*.

## PURPOSES OF AMENDMENTS.

2.1 The purposes of the amendments set out in *An Act to amend the Immigration Act and the Criminal Code in consequence thereof*, chapter 29 of the 4th Supplement to the Revised Statutes of Canada, are the following:

- (a) to preserve for persons in genuine need of protection access to the procedures for determining refugee claims;
- (b) to control widespread abuse of the procedures for determining refugee claims, particularly in light of organized incidents involving large-scale introduction of persons into Canada to take advantage of those procedures;
- (c) to deter those who assist in the illegal entry of persons into Canada and thereby minimize the exploitation of and risks to persons seeking to come to Canada; and
- (d) to respond to security concerns, including the fulfillment of Canada's obligations in respect of internationally protected persons. R.S.C. 1985 (4th Supp.), c. 29, s. 1.

## PART I CANADIAN IMMIGRATION POLICY

### Objectives

## IMMIGRATION OBJECTIVES.

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

- (a) to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;
- (b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
- (c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;
- (d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto;

- (e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;
- (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*;
- (g) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;
- (h) to foster the development of a strong and viable economy and the prosperity of all regions in Canada;
- (i) to maintain and protect the health, safety and good order of Canadian society; and
- (j) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity. 1976-77, c. 52, s. 3; R.S.C. 1985 (4th Supp.), c. 28, s. 2.

*Chan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1825, May 12, 1994.

The issue in this judicial review was whether the words "that will make a significant contribution to the Canadian economy" contained in the definition of an entrepreneur are *ultra vires*.

Section 3 of the Immigration Act sets forth the objectives of Canada's immigration policy. Paragraph (h) recognizes the need to foster the development of a strong and viable economy and the prosperity of all regions in Canada. Therefore, the regulations made by the Governor in Council and their administration must be considered having regard to Canada's immigration policy. When Parliament authorized the Governor in Council to make regulations respecting selection standards based on personal attributes and attainments, it intended that the Governor in Council have the discretion to more fully describe the personal attributes and attainments having regard to Canada's immigration policy objectives and in particular to Canada's domestic interests, including the need to foster the development of a strong and viable economy. Therefore, the words "that will make a significant contribution to the economy" are not *ultra vires* the Immigration Act.

With respect to entrepreneurs, the scheme of the Immigration Act and regulations was that a prospective immigrant was expected to represent to a visa officer the immigrant's intention and ability to establish, purchase or invest in a business or a commercial venture in Canada. When the immigrant lands, the immigration officer at the port of entry attaches conditions to the immigrant's visa so that the representations made to the visa officer survive the landing and the immigrant can be required to fulfil them.

The assessment of whether an applicant has fulfilled the terms and conditions must concern itself with the two-year period following the applicant's landing. Whether a business will make a significant contribution to the Canadian economy or create or



continue employment for Canadian citizens or permanent residents is not something that lends itself to a momentary assessment. The notion of a significant contribution to the economy with the continuation of employment are on-going circumstances and require more long-term assessment. The immigration officer must be permitted the scope to reasonably satisfy himself or herself that the business or commercial venture has and will make a significant contribution and that employment opportunities will be created in a meaningful way.

Finally, there may be many reasons for bankruptcy and bankruptcy alone would not preclude the applicant from having met the conditions attached to his landing, but these are circumstances for objective assessment by an immigration officer.

*Kindler v. Canada (Min. of Justice)*, [1991] 2 S.C.R. 779, 8 C.R. (4th) 1, 67 C.C.C. (3d) 1, 6 C.R.R. (2d) 193, 84 D.L.R. (4th) 438, 45 F.T.R. 160 (note), 129 N.R. 81 (S.C.C.).

While this case dealt with whether the decision of the Minister of Justice to surrender the appellant to the United States without first seeking assurances that the death penalty would not be imposed violated the appellant's rights under the Canadian Charter of Rights and Freedoms, there are some comments in the case which are useful. The Supreme Court of Canada (per La Forest J.) noted that the Government has the right and duty to keep out and to expel aliens from Canada if it considers it advisable to do so. This right exists independently of extradition. If an alien has a serious criminal record, he can be refused admission and, by the same token, deported if he has already entered Canada. Extradition and deportation do not always have the same purposes. Cases can arise where they serve different ends, and fairness may demand that one procedure be used rather than the other. In this case, the Court would have been concerned about resorting to deportation rather than extradition because extradition has in-built protections geared to the criminal process.

*Mannan v. Canada (Min. of Employment & Immigration)* (1991), 16 Imm. L.R. (2d) 73, 48 F.T.R. 259 (T.D.).

This decision provides a useful statement of first principles which are to govern the Court's approach to interpreting the Immigration Act.

The Court stated that the purpose of the Immigration Act was to regulate immigration into Canada, which means that some immigration is permitted and some is rejected according to the law.

To determine the purpose of a statute the Court recommended the procedure in *Heydon's Case* (1584), 3 Co. Rep. 7a, 76 E.R. 637, to the effect that the true interpretation of a statute is to proceed according to the following principles:

1. the determination of what the common law was before the making of the Immigration Act;
2. the determination of the mischief and defect for which the common law did not provide;
3. the examination of the remedy that Parliament has resolved and appointed to cure the problem; and
4. it is the responsibility of judges to make such construction of the statute as required to suppress the mischief which Parliament addressed and advance the remedy which Parliament provided. The Court is to suppress subtle inventions and evasions designed to continue the mischief.

The Court noted that at Confederation section 95 of the Constitution Act, 1867 provided that each province can make laws in relation to immigration into the province and that the Parliament of Canada may from time to time make laws in relation to immigration into all or any of the provinces and that any provincial law in relation to immigration has effect only so long as it is not repugnant to a law of the Parliament of Canada in relation to immigration. Further, the Court noted that section 95(25) distributed legislative power in relation to naturalization and aliens to Parliament.

The Court then went on to deal with the merits of this case and dismissed the application for judicial review.

*Canada (Min. of Employment & Immigration) v. Bhatnager*, S.C.C., Doc. No. 20771, June 21, 1990.

The respondent, Bhatnager, sought a writ of *mandamus* to compel the Minister to process the application for landing of her husband, an Indian citizen living in India. There had been, to the time of her application, a delay of almost 5 years in processing the respondent's husband's application.

Prior to hearing the respondent's motion, an affidavit of an immigration officer was filed on behalf of the Minister. On July 11, 1985, in the course of cross-examination on that affidavit, counsel for the Minister agreed to produce the Ministry's New Delhi file. The hearing of the application was adjourned until September 3, 1985. Several telexes were sent to New Delhi requesting the file but over a month passed with no sign of it. The respondent brought two motions; the first adding the Secretary of State for External Affairs as a party respondent and the second ordering production of the New Delhi file. Both motions were granted on August 15, 1985 in open court and in the presence of counsel for the appellants. Part of the formal order required production of the file and sufficient time for the cross-examinations to be completed in time for the scheduled hearing on September 3, 1985. On August 20, 1985, a copy of the order was served on the appellant's solicitor by the respondent's solicitor. There is no evidence that the order was served on either of the appellants or that they were informed of its existence. On August 26, 1985, counsel for the parties agreed to continue the cross-examination of the appellant's representative on August 29 on the assumption that the file or a copy of it would be available. Counsel for the respondent received what purported to be a copy of the file on August 27, 1985 but in the course of the cross-examination it was discovered that several relevant documents were missing. In the meantime, the original file had arrived in Ottawa by diplomatic bag on August 28, 1985. For some reasons which were not explained in evidence, the file did not arrive in Toronto until August 30, 1985, the last business day before the hearing of the respondent's application for *mandamus*. The respondents were cited for contempt and the motion for *mandamus* was granted. The respondents were acquitted of contempt at the trial division. The Federal Court of Appeal overturned this decision and found the appellants guilty of contempt and remitted the matter to the trial Judge for assessment of penalty. The appellant Ministers appealed to the Supreme Court of Canada which allowed the appeal and found the appellants not guilty of contempt. The Court noted that an allegation of contempt of court is a matter of criminal dimension. A finding of guilt could have subjected the appellants to a fine of as much as \$5,000 and the possibility of imprisonment to a maximum of 1 year. Common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. A finding of

knowledge on the part of the client may, in some circumstances, be inferred from the fact that the solicitor for the client was informed of the order. In the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments, it would be extraordinary if orders were brought routinely to their attention. In order to infer knowledge from service upon the Minister's solicitor, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister. Knowledge, in most cases, is proved circumstantially and in contempt cases, the inference of knowledge will always be available where facts capable of supporting the inference are proved. Ministers will not be able to hide behind their lawyers so as to flout orders of the court. Any instructions to the effect that the Minister is to be kept ignorant may attract liability on the basis of the doctrine of wilful blindness. Furthermore, a Minister of the Crown cannot be confident in any given case that the inference will not be drawn and hopefully this will serve as a sufficient incentive for the Minister to see to it that officials are impressed with the importance of complying with court orders.

*Ho v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 38, 27 F.T.R. 241 (Fed. T.D.).

It is important to bear in mind that Parliament's intention in enacting the Immigration Act is to define Canada's immigration policy both to Canadians and to those who wish to come here from abroad. Such a policy cannot exist without complex regulations, a good many of which appear to be restrictive in nature but the policy should always be interpreted in positive terms. The purpose of the statute is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation.

*Min. of Employment & Immigration v. Porter*, Fed C.A., Doc. No. A-353-87, April 14, 1988.

The visa officer's refusal of an application for permanent residence which, in fact, is based on an administrative delay of the Minister's own creation is invalid in law. The Government's duty is to facilitate family class applications, not to frustrate them.

*Rajudeen v. Min. of Employment & Immigration* (1984), 55 N.R. 129 (Fed. C.A.).

The definition of Convention refugee does not include a definition of persecution. "Persecute" was defined by reference to a dictionary as "to harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently; to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship." "Persecution" was defined as "a particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source."

There is a subjective and objective component necessary to satisfy the definition of Convention refugee. The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.

In determining whether refugee status has been extended to cover a particular case, reference should be made to the expression of underlying policy in section 3(g) of the Act. To satisfy the definition, the persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state



toward the individual or in the state knowingly tolerating the behaviour of private citizens or refusing or being unable to protect the individual from such behaviour.

*Gana v. Min. of Manpower & Immigration*, [1970] S.C.R. 699, 13 D.L.R. (3d) 699 (S.C.C.).

This case provides an interesting historical perspective on the evolution of immigration policy. The Court, through Abbott J., points out that the scheme of the Immigration Act, R.S.C. 1952, was relatively simple. The only persons entitled to enter Canada as of right were Canadian citizens and persons having a Canadian domicile; all others required the permission of the Minister acting through his departmental officials. Those coming for a temporary stay were given permission to do so for a limited period as a visitor, student, or for some other purpose. Would-be immigrants were subject to examination as to their suitability on medical grounds, educational qualifications and the like. Those found satisfactory by the examining officer at the port of entry were granted permission to enter and remain as landed immigrants. The decision to grant or refuse such status, in accordance with the Act and Regulations, was made at the discretion of the immigration officer at the port of entry and was an administrative decision, not subject to review by anyone other than the Minister. Once a person was in Canada, having been granted the status of a landed immigrant, he could only be deprived of that status and ordered deported after a hearing before a special inquiry officer. If deportation was ordered, that order was subject to an appeal to the Immigration Appeal Board.

Prior to 1967, would-be immigrants who applied outside Canada or at border points and those already in Canada on a temporary basis were treated on the same basis. In 1967, however, a person who had been allowed to enter Canada as a visitor, or on some other temporary basis, was permitted to apply to an immigration officer in Canada, before the authorized period of his stay expired, for admission as a landed immigrant. A decision to refuse such an application was subject to appeal to the Immigration Appeal Board, creating the situation where persons who entered Canada ostensibly as non-immigrants were given a special consideration in relation to permanent admission as residents.

### Principles

***WHERE RIGHT TO COME INTO CANADA — Where rights to remain in Canada — Right of Convention refugees — Rights of Indians.***

4. (1) A Canadian citizen and a permanent resident have a right to come into Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

#### **WHERE RIGHT TO COME INTO CANADA**

4. (1) A Canadian citizen and, subject to section 10.3, a permanent resident, have a right to come into Canada except where, in the case of a permanent resident, it is established that the person is a person described in subsection 27(1). [1992, c. 49, s. 2. Not in force at date of publication.]

(2) Subject to any other Act of Parliament, a Canadian citizen and a

permanent resident have a right to remain in Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

(2.1) Subject to any other Act of Parliament, a person who is determined under this Act or the regulations to be a Convention refugee has, while lawfully in Canada, a right to remain in Canada except where it is established that the person is a person described in paragraph 19(1)(c.1), (c.2), (d), (e), (f), (g), (j), (k), or (l) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(a) more than six months has been imposed; or

(b) five years or more may be imposed.

(3) A person who is registered as an Indian pursuant to the *Indian Act* has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen. 1976-77, c. 52, s. 4; R.S.C. 1985 (4th Supp.), c. 28, s. 3; 1992, c. 49, s. 2.

### *Subsection (1)*

*Alexander v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9138, July 18, 1978.

The Board held that it had the power to determine whether a person was a permanent resident and, thus, to determine whether it had jurisdiction to hear the appellant's appeal. In this case, it found that it had jurisdiction to entertain the appeal pursuant to section 72(1) of the Act and that the appellant had, pursuant to section 4(1) of the Act, the right to come into Canada and, therefore, on his return to Canada did not have to be in possession of an immigrant visa.

*Prata v. Min. of Manpower & Immigration*, [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383, 13 N.R. 484 (S.C.C.).

This section alters the common law positions of Convention refugees and permanent residents. Common law was that no alien had any right to enter the country except by leave of the Crown, and that the alien was liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence in the country was not conducive to the public good.

### *Subsection (2.1)*

*Boun-Leau v. Min. of Employment & Immigration*, [1981] 1 F.C. 259, 133 D.L.R. (3d) 414, 36 N.R. 431 (Fed. C.A.).

An individual who is determined to be a Convention refugee by the Minister pursuant to section 45 [old Act] of the Act is not automatically "lawfully" in Canada under section 4(2). That determination only accords the right not to be returned to a place where his life or freedom would be threatened, and a right to appeal a removal or deportation order. The applicant, as a refugee, had been admitted to France and could return to

that country. There was, therefore, no obligation on the Minister to permit him to remain in Canada and the applicant had no legal right to do so.

*Prata v. Min. of Manpower & Immigration*, [1976] 1 S.C.R. 376, 52 D.L.R. (3d) 383, 3 N.R. 484 (S.C.C.).

For digest, see section 4, subheading *subsection (1)*, *supra*.

**WHERE PRIVILEGE TO COME INTO OR REMAIN IN CANADA — Where immigrant shall be granted landing — Where visitors may be granted entry or allowed to remain.**

5. (1) No person, other than a person described in section 4, has a right to come into or remain in Canada.

(2) An immigrant shall be granted landing if he is not a member of an inadmissible class and otherwise meets the requirements of this Act and the regulations.

(3) A visitor may be granted entry and allowed to remain in Canada during the period for which he was granted entry or for which he is otherwise authorized to remain in Canada if he meets the requirements of this Act and the regulations. 1976-77, c. 52, s. 5.

#### *Subsection (2)*

*Re Mahmood*, Fed. T.D., Doc. No. T-3559-80, January 13, 1981.

The acceptance by the Minister of an application for sponsorship, along with the representation that the application will not be dealt with until the sponsoree's husband departed from Canada, will lead to an order in the nature of *mandamus*, requiring the Minister to consider the sponsorship application, where the applicant produces some evidence that would warrant a conclusion that humanitarian and compassionate grounds exist that might justify a grant by the Minister of permanent residence. The onus is on the applicant to produce such evidence and where the applicant fails to produce such evidence, the application for an order in the nature of *mandamus* will be refused.

#### *Subsection (3)*

*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386, 26 C.R.R. 152, 30 D.L.R. (4th) 157 (Fed. C.A), reversing [1985] 2 F.C. 124, 20 C.R.R. 193, 23 D.L.R. (4th) 564 (Fed. T.D.).

The applicant sponsored his relatives' family class application for permanent residence. The application was denied and the applicant appealed to the Immigration Appeal Board. The visa officer refused to issue visitors' visas to the relatives who were required as witnesses at his appeal. The visas were refused on the basis that the applicants were not *bona fide* visitors because their intention was to testify at the applicant's appeal. An order of *mandamus* was issued requiring the Minister to grant the relatives visitors' visas to allow them to testify at the appeal. This order was reversed on appeal. *Mandamus* will issue to require performance of a duty; it cannot, however, dictate the result to be



reached. *Certiorari* might have been available to quash the refusal of the visitors' visas and to refer the matter back for reconsideration but the respondent had not sought this type of order.

### Selection of Immigrants

***GENERAL PRINCIPLE OF ADMISSIBILITY OF IMMIGRANTS — Sponsorships — Displaced and persecuted — Sponsorships — Landing on public policy or humanitarian or compassionate considerations — Selection by province — Idem — Assessment.***

6. (1) Subject to this Act and the regulations, any immigrant, including a Convention refugee, and all dependants, if any, may be granted landing if it is established to the satisfaction of an immigration officer that the immigrant meets the selection standards established by the regulations for the purpose of determining whether or not and the degree to which the immigrant will be able to become successfully established in Canada, as determined in accordance with the regulations.

(2) Any Canadian citizen or permanent resident may, where authorized by the regulations, sponsor the application for landing of

(a) any person who, in relation to the Canadian citizen or permanent resident, is a member of the family class; and

(b) any immigrant who is a member of a class of immigrants prescribed by regulations made under paragraph 114(1)(c).

(3) Any Convention refugee and any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted, may be granted admission, subject to such regulations as may be established with respect thereto and to the immigration plan currently in force and notwithstanding any other regulations made under this Act.

(4) Any body corporate incorporated by or under any Act of Parliament or the legislature of a province, and any group of Canadian citizens or permanent residents, may, where authorized by the regulations, sponsor the application for admission of

(a) any Convention refugee; and

(b) any person who is a member of a class of persons designated for the purposes of subsection (3) or of a class of immigrants prescribed by regulations made under paragraph 114(1)(e).

(5) Subject to subsection (8) but notwithstanding any other provision of this Act or any regulation made under paragraph 114(1)(a), an immigrant and all dependants, if any, may be granted landing for reasons of public policy or

compassionate or humanitarian considerations if the immigrant is a member of a class of immigrants prescribed by regulations made under paragraph 114(1)(e) and the immigrant meets the landing requirements prescribed under that paragraph.

(6) Where an immigrant intends to reside in a province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of certain prescribed classes of immigrants who intend to reside in the province, that immigrant and all dependants, if any, may be granted landing only if

(a) the immigrant is a member of a prescribed class of immigrants over which the province has, in whole or in part, responsibility for the selection thereof, [1992, c. 49, s. 3. Not in force at date of publication.]

(b) where the immigration plan currently in force sets out, in respect of that province and in respect of the prescribed class of immigrants of which the immigrant is a member, the maximum number of visas that may be issued to immigrants of that prescribed class of immigrants in that calendar year or, as the case may be, the maximum number of immigrants of that prescribed class of immigrants who may be granted landing in that calendar year, that number has not been reached,

(c) the province has determined that the immigrant meets, or the immigrant and the dependants meet, as the case may be,

(i) where the immigrant is of a class of immigrants over which the province has sole responsibility for the selection thereof, the selection standards established by the laws of the province, and

(ii) where the immigrant is of a class of immigrants over which the province has in part responsibility for the selection thereof, either the selection standards established by the laws of the province or the selection standards established by regulations made under paragraph 114(1)(a),

(d) where the immigrant is of a class of immigrants prescribed by regulations made under paragraph 114(1)(e), the immigrant meets the landing requirements prescribed under that paragraph, and

(e) where the immigrant is of a class of immigrants other than a class of immigrants prescribed by regulations made under paragraph 114(1)(e), neither the immigrant nor any of the dependants, if any, is a member of an inadmissible class,

but where the requirements in paragraphs (a) to (e) are met, the immigrant, or the immigrant and all accompanying dependants, as the case may be, shall be granted landing.

(7) Where a Convention refugee seeking admission pursuant to subsection (3) or a person of a class designated for the purposes of that subsection intends to reside in a province that has entered into an agreement pursuant to section

108 whereby the province has sole responsibility for the selection of such Convention refugees or certain classes of persons designated for the purposes of subsection (3) who intend to reside in the province, that Convention refugee or person and all dependants, if any, may be granted admission only if

(a) the Convention refugee is a Convention refugee over which the province has sole responsibility for the selection thereof, or the person is of any of those designated classes over which the province has sole responsibility for the selection thereof, as the case may be;

(b) where the immigration plan currently in force sets out, in respect of that province and in respect of those Convention refugees or that designated class, the maximum number of visas that may be issued to Convention refugees or to persons of that designated class in that calendar year or, as the case may be, the maximum number of persons of that designated class who may be granted admission in that calendar year, that maximum number has not been reached,

(c) the province has determined that the Convention refugee or person meets, or the Convention refugee, or the person, and the dependants, meet, as the case may be, the selection standards established by the laws of the province, and

(d) neither the Convention refugee or the person, nor any of the dependants, if any, is a member of an inadmissible class,

but where the requirements in paragraphs (a) to (d) are met, the Convention refugee, or the person, and all accompanying dependants, as the case may be, shall be granted admission.

(8) Where an immigrant is of a prescribed class of immigrants for which the regulations specify that the immigrant and any or all dependants are to be assessed, the immigrant and all dependants may be granted landing if it is established to the satisfaction of an immigration officer that the immigrant and the dependants who are to be assessed meet, collectively,

(a) the selection standards established by the regulations for the purpose of determining whether or not and the degree to which the immigrant and all dependants will be able to become successfully established in Canada, as determined in accordance with the regulations; or

(b) the landing requirements prescribed by regulations made under paragraph 114(1)(e). 1976-77, c. 52, s. 6; 1992, c. 49, s. 3.

### *Subsection (1)*

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer



in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another Immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an applicant with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Uy v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 172, 121 N.R. 248, 40 F.T.R. 80 (note) (Fed. C.A.).

This is an appeal from the Trial Division which refused *certiorari* quashing the refusal by a visa officer of the appellant's independent application. The appellant had been a qualified medical doctor in the Philippines and was a resident in pediatrics in the United States when he applied for admission to Canada as a medical technologist. The visa officer refused to assess him in respect of that occupation because he did not believe that the appellant would pursue the occupation in Canada. In doing so, the visa officer erred in law. There was no suggestion in this case that the visa officer had assessed the appellant for the occupation of medical technologist. The visa officer awarded him 70 or more units and then invoked section 11(3) of the Regulations by reason of his conclusion as to the appellant's intentions. Section 6 of the Act requires a visa officer to assess any immigrant who applies for landing in the manner prescribed by the Act and Regulations. Section 8(1) of the Regulations imposes in mandatory terms a duty to assess and nothing in either the Act or Regulations permits a visa officer to refuse to assess in respect of the occupation or alternative occupations which the immigrant states he or she intends to pursue in Canada. The general discretion given a visa officer by section 9(1) of the Regulations must be subordinated to the particular discretion given by section 11(3) where, notwithstanding the award of at least 70 units, the visa officer is of the opinion that those units do not reflect the chances of the particular immigrant becoming successfully established in Canada. The reasons for that opinion must be committed to writing and submitted to and approved by a senior Immigration officer. Accordingly, the appeal was allowed.

*Li v. Canada (Min. of Employment & Immigration)* (1990), 9 Imm. L.R. (2d) 263 (Fed. T.D.).

The applicant requested permanent residence in Canada as an independent applicant

pursuant to section 6(1) of the Immigration Act. Such applications involve a two-stage process during which it is the visa officer's duty to apply criteria set forth in the legislation and award points based on the ability of the applicant to become successfully established in Canada.

The first phase of the assessment is a paper-screening process in which immigration officials evaluate documents submitted by applicants and decide if the application process should be continued. If the applicant passes this phase, he is invited to an interview with a visa officer. During the interview, the officer assesses the employment experience of the applicant and awards points for other factors based on information presented at that time.

One of the most significant factors in any assessment is the applicant's possibility of employment in Canada. Points are awarded both for occupational demand in the screening step and for experience in the final assessment. This process requires reference to the Canadian Classification and Dictionary of Occupations (C.C.D.O.). Assessment of any one intended occupation begins with the matching of the applicant's work routine with the specific occupation from the C.C.D.O.

There is a clear responsibility on the part of the visa officer to assess alternate occupations inherent in the applicant's work experience. Where his work experience suggests that the occupation may be appropriate, the visa officer must assess the applicant in the designated occupation regardless of which alternate occupations the officer has seen fit to consider.

The applicant's present occupation in the Philippines was that of a proprietor of two businesses. The applicant spends approximately 90 per cent of his time dealing with the wholesale distribution of office machines and considered that the best designation in the C.C.D.O. was that of "Commercial Traveller". Further, in a letter to the Canadian Consulate General, the applicant asserted that he had the necessary qualifications as a "Sales Representative, Office Machines", a subclassification of Commercial Traveller. The officer formed the impression that the applicant sold only hand calculators on a retail basis. The officer concluded that the applicant lacked product and plant experience and stated that he was "unable to assess your application in that category". The decision was set aside and the visa officer was required to evaluate the applicant's work experience in the category the applicant originally requested. The respondent Minister was directed to carry out the required assessment through a different visa officer.

*Hajariwala v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 222, 34 Admin. L.R. 206, 23 F.T.R. 241, [1989] 2 F.C. 79 (Fed. T.D.).

The Court observed that those seeking landing in Canada must satisfy an immigration officer that they meet the selection standards set out in the regulations. It is the responsibility of the applicant to produce all relevant information which may assist in his application. The extent to which immigration officers may wish to offer assistance, counselling or advice may be a matter of individual preference or even a matter of departmental policy from time to time but it is not an obligation that is imposed upon the officers by the Act or the regulations.

Section 18 reviews are not appellate reviews. To succeed, the applicant must do more than establish the possibility that the Court would have reached a different conclusion than the visa officer in the assessment. There must be either an error of law apparent on the face of the record or a breach of the duty of fairness appropriate to this essentially

administrative assessment. The regulations permit the applicant to be assessed in "an occupation". The factors listed in column 1 of schedule 1 require that the experience of the applicant be assessed with regard to his intended occupation. There is no reason why the actual experience and time spent in each of the various responsibilities in an occupation cannot be broken down to award units of assessment for experience in intended occupations. As a matter of fairness, the record should show that the applicant was given the opportunity to provide information in support of his current experience in each included occupation. The record must clearly indicate reasons which support the visa officer's assignment of a specific experience rating to the intended occupations or reasons which support the refusal to do so. In this case, the officer did not believe that the various responsibilities which the applicant carried out in his business in India should be broken down into separate components for the purposes of awarding units of assessment for experience in his alternative intended occupation of material purchasing or garment sales representative. Accordingly, the officer refused to issue a visa and in so doing erred in law. The officer's decision was set aside.

*Karim v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 32, 21 F.T.R. 237 (Fed. T.D.).

The plaintiff came to Canada as a domestic helper. At the end of her second year, she was found to have failed to meet the criteria of the foreign domestic movement programme. This decision was quashed. In order for the first year of the programme to be fairly assessed, the plaintiff should have been fully advised of her rights under the programme and what was expected of her at the *beginning* of the first year. The programme was held not to have commenced for the applicant until she was appropriately counselled. The policy and guidelines surrounding this particular programme state that they are to be applied with leniency and flexibility and that the thrust of the programme is toward a gradual two-year assisted upgrading of skills. The plaintiff did not enjoy a proper initial briefing session. The counselling she was given did not provide her with any meaningful alternatives and the methods she attempted on her own initiative were discounted.

*Johl v. Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 105, 15 F.T.R. 164 (Fed. T.D.).

The applicant had arrived in Canada in 1980 and was a valid visitor until May 14, 1981. The applicant then resided illegally in Canada until February 19, 1987, when he attended at a Canada Immigration Centre to apply for permanent resident status under the *de facto* illegal residents programme. The guidelines for this programme attempt to determine whether an illegal immigrant has economically and socially established himself in Canada. On February 16, 1987, the applicant was interviewed by an immigration officer, who then recommended to his manager that the application be favourably considered. The manager reviewed the officer's recommendation and concluded that the applicant did not meet the requirements of the programme. His decision was overturned by the Court because the guidelines for this programme were not followed nor were they applied fairly. The manager was required to do more than merely make a few telephone calls and meet with the officer in question before failing to accept the officer's recommendation. Further, the applicant was entitled to an opportunity to reply to some of the discrepancies that were affecting the manager's decision. Also, the applicant is



required to establish that he has adapted himself socially to Canada. The manager had no information in this regard which would justify overturning the interviewing officer's recommendation. The Court pointed out that the shortage of personnel to handle these types of applications was no excuse for the application not being handled properly and fairly. Accordingly, the Court ordered the quashing of the decision of the respondent to refuse the applicant's application under the *de facto* illegal residents programme. Further, the Court directed the Minister to assess and determine the application under that programme in accordance with the guidelines set forth. Further, the Court ordered that the ongoing inquiry, in respect of the applicant, be prohibited from continuing.

*Fulay v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-152-83, April 19, 1984.

The applicant entered Canada in 1980 with authorization to accept employment as a domestic worker. She received various extensions of her visa, the last one being valid to August 20, 1982. In January 1982 the applicant became aware of a programme to assist foreign domestics to gain permanent residence status. In July 1982 the applicant sought an extension of her visa and, in accordance with instructions received earlier from an immigration officer, applied for consideration under the foreign domestics programme. This programme required domestics already in Canada to be treated the same as domestics who were newly entering Canada from abroad. These new entrants were given a preliminary assessment after one year and if found not suitable for landing were to be given an additional year in which to upgrade themselves. Fulay's application was not treated in a manner consistent with the procedure available to new entrants. Her application was simply rejected. The decision rejecting the application was quashed because the respondent, in discharging its administrative responsibilities, had failed to treat the applicant fairly because she was not accorded a one year extension of her visa to permit her to upgrade her skills and make herself more suitable for landing. It was referred back to the respondent for consideration of a fresh application in accordance with the foreign domestics programme.

*Re Mahmood*, Fed. T.D., Doc. No. T-3559, January 13, 1981.

The acceptance by the Minister of an application for sponsorship, along with the representation that the application will not be dealt with until the sponsoree's husband departed from Canada, will lead to an order in the nature of *mandamus*, requiring the Minister to consider the sponsorship application, where the applicant produces some evidence that would warrant a conclusion that humanitarian and compassionate grounds exist that might justify a grant by the Minister of permanent residence. The onus is on the applicant to produce such evidence and where the applicant fails to produce such evidence, the application for an order in the nature of *mandamus* will be refused.

### *Subsection (3)*

*Afkhami v. Canada (Employment & Immigration Comm.)* (1987), 12 F.T.R. 76 (Fed. T.D.).

The applicant was born in Iran and arrived with his wife in Canada on September 18, 1986. Upon arrival, both he and his wife requested political refugee status. The applicant was denied a Minister's permit and sought an order of *mandamus* to prevent

continuation of a hearing pursuant to section 23(3) of the Immigration Act, and to order the Minister to issue the applicant a permit in conformity with directive B1. The application was dismissed. Unlike the provisions of the Immigration Act and Regulation, policies or programmes, such as this one, were held not to create legal rights enforceable by way of *mandamus*.

*Young v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 77 (Fed. T.D.).

The applicant was a citizen of the People's Republic of China. He went to Guyana in 1979 because of instability in China. In 1986 he returned to China and booked the return trip to Guyana with a stop-over in Canada. The applicant sought to take advantage of the procedures for refugee claimants from the People's Republic of China; specifically, he wanted a Minister's permit with an employment authorization for 12 months. This was denied on the basis that the applicant was a permanent resident of Guyana and not eligible for the privileges available to refugee claimants from the People's Republic of China.

Unlike the provisions of the Immigration Act or Regulations, policies or programmes, such as this one, do not create legal rights enforceable by way of *mandamus*. The failure to accord the applicant a 12-month Minister's permit in accordance with the 12 months' special policy available to claimants from the People's Republic of China was not an infringement of the duty to act fairly. Nothing had happened to prejudice the applicant's right to claim refugee status during the course of an inquiry and thereafter to have access to the refugee determination process.

### *Subsection (5)*

*Dawkins v. Canada (Min. of Employment & Immigration)* (1991), 45 F.T.R. 198, [1992] 1 F.C. 639.

The applicant sought an order quashing the decision of an immigration officer that there were insufficient humanitarian and compassionate grounds for the exercise of discretion under section 114(2). It is not appropriate for a reviewing Court to interfere with the exercise of a statutorily granted discretion unless it is clear that this discretion was exercised unreasonably, in bad faith or was based on irrelevant considerations. The Court should not, in effect, substitute its own conclusion on an issue for that of the administrator vested with the discretion. The respondent Minister did not fetter the discretion of immigration officers by preventing them from considering those in the refugee backlog as eligible for the same treatment as those in the illegal *de facto* resident policy on the ground that they had previously come to the attention of the respondent. It cannot seriously be disputed that general standards are necessary for the effective exercise of discretion in section 114(2) cases. This is necessary to ensure a certain level of consistency from one decision to another and to avoid a patchwork of arbitrary and haphazard decisions. Uniformity in decision making must be balanced against a need to consider individual cases on their own merits. There is a fundamental difference between humanitarian and compassionate considerations referred to in section 114(2) and public policy also referred to in section 114(2). Public policy has no objective content and must be defined by those having the authority to define public policy. Immigration officers do not have the right and obligation to define their own public policy. With

respect to the humanitarian and compassionate considerations, the guidelines are not to be regarded as exhaustive and definitive but rather the officers are expected to use their best judgment. In the context of this case, the officer was found not to have fettered her discretion or to have acted unfairly or unreasonably and accordingly the application was dismissed.

*Virk v. Canada (Min. of Employment & Immigration)* (1991), 46 F.T.R. 145.

This was an application to quash an immigration officer's refusal to find sufficient public policy grounds or humanitarian and compassionate considerations to justify relief under section 114(2) of the Act. When dealing with a matter of public policy, it is completely within the mandate of an immigration officer to seek the advice of a supervisory authority. The spousal relationship and its effect on a section 114(2) application is a public policy issue. The guidelines state that no additional hardship need be established in cases of a genuine marriage. The guidelines also say that there is no obligation to deal favourably with spouses who are inadmissible under section 19 of the Immigration Act. In this case, the officer's decision to refuse relief under section 114(2) was upheld.

*Johl v. Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 105, 15 F.T.R. 164 (Fed. T.D.).

For digest, see section 6, subheading *Subsection (1), supra*.

*De Gala v. Canada (Min. of Employment & Immigration)* (1987), 8 F.T.R. 179 (Fed. T.D.).

The applicant was a 50-year-old single person from the Phillipines who came to Canada to work as a domestic for her niece. The applicant received negative initial and final assessments in interviews under the Foreign Domestic programme. Although the applicant was not a "new entrant" within the meaning of the Foreign Domestic guidelines, it was held that the "new entrant" portion of the guidelines applied to all domestics. The "guidelines or policy" as expressed in the Immigration Manual for the Foreign Domestic programme are significant and must be followed in order for procedural fairness to occur in a particular case. The applicant was not asked to contact a Canada Employment Centre for counselling and determination of training and skill upgrading needs. The evidence indicated that the interviewing officer was neither flexible nor lenient in either of the assessment interviews as required by the guidelines. The applicant had a grade 6 education as well as training as a seamstress, and this was held to be sufficient for someone seeking employment as a domestic.

The applicant was denied the use of her relative as an interpreter at the initial assessment and, in fact, no interpreter was provided. The Court observed that a person who is to be interviewed can and should be allowed to be accompanied during the interview. The Court observed, however, that the officer conducting the interview should have set conditions to prevent interference with the interview process. Failure to have a friend present who spoke English, as well as the failure to have an interpreter at the initial interview, and the conduct of the initial interview in English, undermined the assertion that the applicant was not sufficiently conversant in the English language to be able to establish herself in Canada. Accordingly, the applicant was found to have been treated in an unfair manner and the decision whereby she was found not to have demonstrated evidence of her ability to become self-sufficient in Canada was set aside.



*Aboc v. Canada (Min. of Employment & Immigration)* (1986), 7 F.T.R. 236 (Fed. T.D.).

The applicant arrived at Toronto International Airport in July, 1982. She was interviewed in the usual way and ultimately was given an employment authorization, which the respondent at all times considered to be an authorization under the Foreign Domestic programme. There was no evidence of even a verbal explanation of the programme being given to the applicant at the time she entered Canada. The initial negative assessment was not communicated to the applicant. Subsequent assessments that questioned the genuineness of her degree in the Philippines were not communicated to the applicant. Due to the fact that no one had informed the applicant of what was expected of her, an order in the nature of *certiorari* setting aside the refusal to grant the applicant access to status in Canada under the Foreign Domestic programme was issued. Further, an order was made that the applicant be allowed to continue in Canada and to return to the situation the applicant was in at the port-of-entry when she first came here. This order directed that the applicant be treated as any other fresh applicant in the Foreign Domestic programme in accordance with the existing provisions of the Statute and Regulations.

*Williams v. Canada (Min. of Employment & Immigration)*, [1985] 2 F.C. 153 (Fed. T.D.).

The applicant was born in Jamaica. She was unmarried and had 5 children, all of whom lived in Jamaica. The applicant arrived in Canada in September, 1979 for a 3-week visit and remained in Canada ever since. The applicant was informed by a lawyer in late 1983 that the long-term illegal migrants' programme did not apply to her because she had not been "underground" for 5 years. On May 29, 1984, the applicant was apprehended and a deportation order was made June 8, 1984. Judicial review of this order was dismissed in November 1984. The applicant's removal on December 1984 was deferred in order that the applicant's case could be reviewed to determine whether she then qualified under the long-term illegal migrants' programme. The applicant did not qualify under the programme. During the period when the applicant's case was being considered, the long-term illegal migrants' programme was modified in such a way that the applicant would have been eligible for the programme but for the fact of her apprehension. The application to restrain the applicant's removal was dismissed. Where a person has been lawfully ordered deported, and the procedure that he or she wishes to invoke is a purely discretionary one in the hope that he or she might be granted a Minister's permit to stay in Canada, any requirement of fairness in the exercise of the Minister's discretion is minimal. Such a case does not involve a benefit to which the applicant is legally entitled nor denial of any rights legally vested in the applicant. There was no denial of fairness because the applicant did not, albeit for different reasons, come within the old or new guidelines of the long-term illegal migrants' programme.

*Ochnio v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1919-85, September 23, 1985.

The applicant sought an order quashing a refusal of an employment authorization. The applicant, Jan Ochnio, a medical research physician, was lawfully admitted to Canada as a visitor on a scholarship to undertake a year of post doctoral studies in his specialty, cancer research, at the University of British Columbia.

In January 1985, while in Canada, the applicants made inquiries about applying for permanent residence. Special assessment interviews were arranged and conducted on July 17, 1985 and August 6, 1985. The applicants were seeking an exemption from section 9(1) of the Immigration Act pursuant to section 115(2) of the Act, the requirement that they have an immigrant visa before appearing at a port of entry. The immigration officers who conducted the interviews in July and August recommended that an application for landing should be processed from within Canada and that the applicants should be exempt from section 9(1) of the Act.

After the August 6, 1985, interview, counsel for applicants was advised that he could expect a decision within two weeks. On their behalf, counsel requested an employment authorization and was advised that this could not be issued until a decision had been made to grant the exemption. Counsel was finally informed that the officers' decision to recommend positively an exemption had been forwarded to the regional office but had not been accepted at that level. The regional office indicated that it would reconsider the case should the applicants be able to obtain a letter from the British Columbia College of Physicians and Surgeons stating that there was a need for the applicants' services in British Columbia. The decision to refuse to issue an employment authorization was quashed. Operations memorandum IS 2.51 clearly indicated that the authority to make recommendations of this type was to be kept at the examining officers' level unless the officers' decision was negative, in which case the officers were to have recourse to the advice of a manager or supervisor. In this case, because the officers had decided to positively recommend an exemption from section 9(1), it was their duty to forward this recommendation to the Governor in Council and they were in error in seeking the concurrence of the regional office in their positive recommendation.

This type of decision by immigration officers was held to be an administrative function; the officers were bound to follow the policy of the government and had a duty to act fairly and conform to regulations and policy. The Court indicated that it could perceive an abuse of policy in this area if superiors, not working in the field, could override the decision of the interviewing officers, particularly in circumstances where they could reject the decision without specifying reasons or offering any explanations.

*Sharma v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-40-85, May 29, 1985., See also *Fulay v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-152-83, April 19, 1984.

This case asserts the proposition that the fairness of the application of the Foreign Domestic Programme to an individual is reviewable by *certiorari*.

### Levels of Immigration

**IMMIGRATION PLAN — Contents of plan — Idem — Number is either estimate or maximum — Idem — Idem — Idem — Idem — Provinces with agreement — Dependants included — Plan may be changed — Changes must be consistent with subsection (9) — Consultations — Plan must be consistent with agreements.**

**7.(1) The Minister, after consultation with the provinces and such persons, organizations and institutions as the Minister deems appropriate, shall, not**

later than the prescribed date in each calendar year, which prescribed date shall be no later than November 1, cause the immigration plan for the next calendar year to be laid before each House of Parliament, or, if either House is not sitting on the prescribed date, not later than the fifteenth day next thereafter on which that House is sitting.

(2) An immigration plan shall, with respect to the calendar year to which it relates, set out

(a) an estimate of the total number of immigrants, Convention refugees and persons of classes designated for the purposes of subsection 6(3) who will be admitted into Canada; and

(b) in respect of every class of immigrants prescribed by regulations made under paragraph 114(1)(b) and every class of persons designated for the purposes of subsection 6(3), and in respect of Convention refugees granted admission pursuant to that subsection and persons determined to be Convention refugees by the Refugee Division, the number of immigrants, persons of those designated classes and Convention refugees to whom visas may be issued or who may be granted admission, as the case may be,

(i) in respect of Canada,

(ii) in respect of each province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of Convention refugees granted admission pursuant to subsection 6(3) or any such class of immigrants or class of persons designated for the purposes of that subsection who intend to reside in the province, and

(iii) in respect of all other provinces.

(3) An immigration plan shall, with respect to the calendar year to which it relates, set out the number of employment authorizations, not including extensions, that may be issued in respect of every class of employment for which regulations made under paragraph 114(1)(j.2) specify that there shall be a numerical limitation in respect thereof.

(4) The number to be established for the purposes of subparagraph (2)(b)(iii) in respect of Convention refugees granted admission pursuant to subsection 6(3) or a class of immigrants or persons designated for the purposes of that subsection shall be a maximum number where regulations made under subsection 114(1) specify that there shall be a numerical limitation in respect thereof and, where the regulations do not so specify, the number shall be an estimate.

(5) Subject to subsection (6), the number to be established for the purposes of subparagraph (2)(b)(ii) in respect of Convention refugees granted admission pursuant to subsection 6(3), in respect of each class of immigrants and in respect of persons designated for the purposes of that subsection shall be a maximum number



(a) where the province has sole responsibility pursuant to the agreement for the selection of those Convention refugees or that class or immigrants or persons and the legislation of the province specifies that there shall be a maximum number in respect thereof, and

(b) where the province does not have, pursuant to the agreement, sole responsibility for the selection of those Convention refugees or that class of immigrants or persons but regulations made under subsection 114(1) specify that there shall be a numerical limitation in respect thereof,

and, in any other case, the number shall be an estimate.

(6) The number to be established for the purposes of subparagraph (2)(b)(ii) in respect of the class of immigrants known as assisted relatives shall be a maximum number where the legislation of the province and regulations made under subsection 114(1) specify that there shall be a maximum number in respect thereof and, in any other case, the number shall be an estimate.

(7) Subject to subsection (8), the number to be established for the purposes of subparagraph (2)(b)(i) in respect of Convention refugees granted admission pursuant to subsection 6(3), in respect of a class of immigrants or in respect of persons designated for the purposes of that subsection shall be a maximum number where

(a) regulations made under subsection 114(1) specify that there shall be a numerical limitation in respect thereof, and

(b) the legislation of each province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of Convention refugees granted admission pursuant to subsection 6(3), immigrants of that class or persons of that designated class who intend to reside in the province specifies that there shall be a numerical limitation in respect thereof,

and, in any other case, the number shall be an estimate.

(8) The number to be established for the purposes of subparagraph (2)(b)(i) in respect of the class of immigrants known as assisted relatives shall be a maximum number where

(a) regulations made under subsection 114(1), and

(b) the legislation of each province that has entered into an agreement pursuant to section 108 whereby the province has in whole or in part responsibility for the selection of assisted relatives who intend to reside in the province,

specify that there shall be a maximum number in respect thereof and, in any other case, the number shall be an estimate.

(9) Where a province has entered into an agreement pursuant to section

108 whereby the province has sole responsibility for the selection of Convention refugees granted admission pursuant to subsection 6(3), certain classes of immigrants or certain classes of persons designated for the purposes of that subsection who intend to reside in the province,

- (a) the proportion that the total of all numbers established for the purposes of subparagraph (2)(b)(ii) bears to the total of all numbers established for the purposes of paragraph (2)(a) may only exceed the proportion referred to in the agreement with the approval of the Minister;
- (b) the numbers established for the purposes of subparagraph (2)(b)(ii) shall be consistent with the agreement;
- (c) subject to paragraph (e), the numbers established for the purposes of subparagraph (2)(b)(ii) in respect of Convention refugees and every class of immigrants and persons designated for the purposes of subsection 6(3) in respect of which the province does not have sole responsibility for the selection thereof shall be established by the Minister in consultation with the province;
- (d) the numbers established for the purposes of subparagraph (2)(b)(ii) in respect of Convention refugees and every class of immigrants and persons designated for the purposes of subsection 6(3) in respect of which the province has sole responsibility for the selection thereof shall be established by the province after taking into consideration advice received from the Minister; and
- (e) the numbers established for the purposes of subparagraph (2)(b)(ii) in respect of the class of immigrants known as assisted relatives shall be established jointly by the Minister and the province.

(10) Unless the regulations provide otherwise, the numbers in an immigration plan shall include accompanying dependants.

(11) Where the Minister considers it necessary to do as the result of unexpected changes in the movement of persons to Canada or as the result of a request of a province referred to in subsection (9) or for any other reason the Minister deems appropriate, the Minister may change any immigration plan that has been laid before both Houses of Parliament pursuant to subsection (1) and, where the Minister does so, the Minister shall lay the amended plan before each House of Parliament within ninety days after making the change or, if either House is not sitting on the expiration of that ninety day period, not later than fifteen days next thereafter on which that House is sitting.

(12) Any changes to an immigration plan must be consistent with subsection (9).

(13) Where a province has entered into an agreement pursuant to section 108 whereby the province has, in part, responsibility for

- (a) the selection of certain classes of immigrants who intend to reside in the province,
- (b) the selection of Convention refugees granted admission pursuant to subsection 6(3) and persons of certain classes designated for the purposes of that subsection who intend to reside in the province, or
- (c) the issuance of employment authorizations in respect of certain prescribed classes of employment to persons who intend to work in the province, the Minister shall consult with that province before making any change to an immigration plan that affects that province in any of those respects.

(14) An immigration plan, and any change thereto, must be consistent with all agreements entered into with provinces pursuant to section 108. 1976-77, c. 52, s. 7; 1992, c. 49, s. 3.

## PART II ADMISSION TO CANADA

### General Presumption

#### *BURDEN OF PROOF — Presumption.*

8. (1) Where a person seeks to come into Canada, the burden of proving that that person has a right to come into Canada or that his admission would not be contrary to this Act or the regulations rests on that person.

(2) Every person seeking to come into Canada shall be presumed to be an immigrant until that person satisfies the immigration officer examining him or the adjudicator presiding at his inquiry that he is not an immigrant. 1976-77, c. 52, s. 8.

#### *Subsection (1)*

*Canada (Min. of Employment & Immigration) v. Gill* (1991), 137 N.R. 373 (Fed. C.A.).

The Immigration and Refugee Board allowed the respondent Gill's appeal from a refusal to approve the application for permanent residence of the respondent's father, two sisters and one brother. The father had been convicted of a criminal offence as described in section 19(1)(c) of the Immigration Act. Subsection 8(1) of the Immigration Act imposes on a person seeking to come into Canada the burden of proving that such a person has a right to come into Canada or that such admission would not be contrary to the Immigration Act or Regulations. An applicant for landing like the principal applicant is inadmissible under paragraph 19(1)(c) unless he has satisfied the onus of providing evidence to the visa officer that the Governor in Council is satisfied that the principal applicant has rehabilitated himself. On this record there was no such evidence and accordingly the Minister's appeal was allowed.

Section 77(3) permits an appeal on the ground that there exist compassionate or



humanitarian considerations that warrant the granting of special relief. A hearing of such nature is a hearing *de novo* in a broad sense and at such a hearing the board is entitled to consider contemporary matters which necessarily involve a consideration of a change of circumstances.

The appeal was allowed and the matter remitted to the Appeal Division to consider whether compassionate or humanitarian considerations warranted the granting of special relief.

### ***Subsection (2)***

*Grewal v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 100, 99 N.R. 29, 27 F.T.R. 159n, [1990] 1 F.C. 192 (Fed. C.A.).

The Immigration Act envisages a two-stage procedure and that after compliance with both stages a visitor may be granted entry to Canada. Stage one is performed outside of Canada by visa officers. Stage two is performed inside of Canada at a port of entry for the most part. Acceptance of a visitor in stage one confers upon that individual a certain status including certain rights of appeal that are not otherwise available. The presumption set out in section 8(2) applies only to the examinations by an immigration officer at a port of entry as set out in sections 11 to 18. It does not apply to visa application proceedings pursuant to sections 9 and 10 of the Act.

*Koo Shew Wan v. Min. of Manpower & Immigration*, [1973] F.C. 578, 38 D.L.R. (3d) 733 (Fed. C.A.).

Under the Immigration Act, R.S.C. 1970, the onus of disproving a specific fact does not arise until the person against whom the fact is alleged is given sufficient indication of what is alleged to be in a position to disprove it.

## **Visas and Special Authorizations**

***APPLICATIONS FOR VISAS — Application on behalf of dependants — Burden on visitors — Assessment by visa officer — Idem — Issuance of visa — Consent required.***

9. (1) Except in such cases as are prescribed, and subject to subsection (1.1), every immigrant and visitor shall make an application for and obtain a visa before that person appears at a port of entry.

(1.1) A person who makes an application for a visa may apply on behalf of that person and every accompanying dependant.

(1.2) A person who makes an application for a visitor's visa shall satisfy a visa officer that the person is not an immigrant.

### ***INFORMATION TO BE SPECIFIED.***

(1.3) An immigrant who makes an application for a visa shall specify in the application

- (a) the prescribed class of immigrants in respect of which the immigrant is applying;
- (b) the names of the immigrant's dependants; and
- (c) the province in which the immigrant intends to reside.

**ASSESSMENT TO BE BASED ON SELECTION STANDARDS.**

(1.4) The assessment of an application for a visa shall be based on the selection standards that have been prescribed for the class of immigrants in respect of which the person making the application is applying. [1992, c. 49, s. 4. Not in force at date of publication.]

(2) An application for an immigrant's visa shall be assessed by a visa officer for the purpose of determining whether the person making the application and every dependent of that person appear to be persons who may be granted landing.

(2.1) An application for a visitor's visa shall be assessed by a visa officer for the purpose of determining whether the person making the application and every accompanying dependant of that person appear to be persons who may be granted entry.

(3) Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations.

(4) Subject to subsection (5), where a visa officer is satisfied that it would not be contrary to this Act or the regulations to grant landing or entry, as the case may be, to a person who has made an application pursuant to subsection (1) and to the person's dependants, the visa officer may issue a visa to that person and to each of that person's accompanying dependants for the purpose of identifying the holder thereof as an immigrant or a visitor, as the case may be, who, in the opinion of the visa officer, meets the requirements of this Act and the regulations.

(5) A visa officer may refuse to issue a visa on the grounds that the person who made an application pursuant to subsection (1), or any of the person's dependants, is a member of an inadmissible class described in paragraph 19(1)(k) only with the written approval of the Minister and the Solicitor General of Canada. 1976-77, c. 52, s. 9, 1992, c. 49, s. 4.

**Subsection (1)**

*Dass v. Canada (Min. of Employment & Immigration)* (1993), 59 F.T.R. 312 (Fed. T.D.).

The applicant entered Canada in December, 1988 and married a Canadian in Winnipeg. The applicant requested an exemption on humanitarian and compassionate grounds from the provisions of subsection 9(1) of the Immigration Act. The marriage was determined to be genuine and a recommendation for an Order-in-Council was made with the following notation: "*Appears to meet requirements. Landing is recommended.*" Subsequent to this recommendation the applicant was charged with assault and weapons offences as a result of a domestic dispute with his wife. These charges came to the attention of Immigration prior to the issuance of the Order-in-Council but notwithstanding this fact an Order-in-Council was issued exempting the applicant from subsection 9(1) of the Act. Approximately a year later the applicant was convicted of the offences with which he was charged. The Commission refused to issue a landing document to the applicant and in addition directed an inquiry.

There was no misrepresentation of information by the applicant nor was there a subsequent determination that the marriage was not genuine. There were no inaccuracies or assumptions about his state of circumstances upon which the Department relied when making its recommendation for an Order-in-Council. The subsequent conviction is analogous to the withdrawal of a sponsorship after the Order-in-Council was issued. Such withdrawals do not affect the right to landing documents. Upon the issuance of the Order-in-Council the applicant became a person with a right to remain in Canada. The applicant acquired a right to be landed and nothing remained to be done in the granting of landing to him. The decision of the Department not to process was quashed. *Mandamus* was issued requiring the Minister to process the application for landing and permit residency while the applicant remained in Canada. The order in this case did not prevent the Commission from commencing proceedings under paragraph 27(1)(d) if it so chose.

*Ferrerya v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 270 (Fed. T.D.).

The applicant arrived in Canada as a visitor. He asserted a claim for Convention refugee status and that claim was found to have no credible basis. The applicant did not report to Immigration authorities and remained in Canada illegally. He finally resurfaced, making an application for landed immigrant status on the basis that he had a Canadian wife. The applicant was exempted from subsection 9(1) of the Immigration Act. An Order-in-Council exempting an individual from the visa requirements of subsection 9(1) does not confer a right to permanent residence. The exemption's effect is to allow the making of an application for landing despite the fact that the applicant is already within Canada. In this case there was no final determination of the applicant's application made on the merits prior to the subsection 9(1) waiver being given. Therefore the waiver did not accord to the applicant any right to permanent residence in Canada.

*Basco v. Canada (Min. of Employment & Immigration)* (1990), 14 Imm. L.R. (2d) 21, 43 F.T.R. 233.

The applicant sought to quash the refusal of her application for an employment



authorization under the foreign domestic movement program. The duty and fairness requires that, wherever possible and practical, the applicant be provided with an opportunity to confront the concerns of the visa officer and to answer them. The visa officer reached a conclusion that, although the applicant had been performing domestic services as she had shown in Hong Kong for some time, she had shown disrespect for Hong Kong immigration rules and therefore would likely do the same in Canada. The failure to permit the applicant an opportunity to respond to this negative assessment resulted in the visa officer's refusal being set aside and a direction that the matter be referred to another visa officer or visa office for a fresh review of the case.

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an applicant with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Grewal v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 100, 99 N.R. 29, 27 F.T.R. 159n, [1990] 1 F.C. 192 (Fed. C.A.).

The Immigration Act envisages a two-stage procedure and that after compliance with both stages a visitor may be granted entry to Canada. Stage one is performed outside of Canada by visa officers. Stage two is performed inside of Canada at a port of entry for the most part. Acceptance of a visitor in stage one confers upon that individual a certain status including certain rights of appeal that are not otherwise available. The presumption set out in section 8(2) applies only to the examinations by an immigration officer at a port of entry as set out in sections 11 to 18. It does not apply to visa application proceedings pursuant to sections 9 and 10 of the Act.

*Dawson v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 37, 21 F.T.R. 212 (Fed. T.D.).

The applicant came to Canada with a valid visitor's visa and married a Canadian citizen sometime after his arrival. An application for permanent residence was filed in Vancouver and subsequently a Minister's Permit was issued. The Governor-in-Council exempted the applicant ultimately from the application of section 9(1). In addition, a child was born of the marriage. As the section 9(1) exemption was granted, the representative of the Minister indicated that the applicant had met all other necessary requirements of the Act, including the attaining of a security clearance. The wife subsequently attempted to withdraw her sponsorship. This was held to have no force or effect because the applicant had acquired the right to be granted permanent residency in Canada as a landed immigrant when the Governor-in-Council's exemption from section 9(1) was granted. Accordingly, the Minister was ordered to process the application for permanent residency and to grant permanent residency in Canada to the applicant.

The Court also observed that, while the mere fact of being a father of a child in Canada might be insufficient reason for there to exist humanitarian or compassionate grounds to allow an individual to remain in Canada as a permanent resident, this fact should be given careful consideration which had not occurred in this case.

*Ho v. Canada (Min. of Employment & Immigration)* (1986), 47 Alta. L.R. (2d) 82, 6 F.T.R. 78 (Fed. T.D.).

The applicant entered Canada on May 22, 1984 on an employment authorization, which was valid until May 2, 1985. On March 26, 1985 he married a Canadian who subsequently sponsored his application for permanent residence. On October 24, 1985, the applicant was exempted from the application of section 9(1) of the Immigration Act. On February 7, 1986, the sponsorship was withdrawn. On February 9, 1986, it was determined that the applicant was in violation of section 27(2)(b) and (e) of the Act. On February 27, 1986, the applicant's employment authorization was taken away.

On May 1, 1986, an inquiry was commenced on the basis that the applicant had violated section 27(2)(b) and (e) of the Act. Prohibition was granted prohibiting the Minister from proceeding with the inquiry and *mandamus* was granted directing the Minister to process the applicant's application for permanent residence from within Canada. Once the applicant had been granted exemption from the requirements of section 9(1) of the Act, he retained the right to make an application for permanent residence from within Canada, notwithstanding the fact that the sponsor purported to withdraw her sponsorship.

*Min. of Employment & Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, [1985] 1 W.W.R. 577, 9 Admin. L.R. 280, 14 D.L.R. (4th) 609, 56 N.R. 215 (S.C.C.).

The Minister of Employment and Immigration through his officers is under a duty to consider applications for exemption on compassionate or humanitarian grounds from the requirement of section 9 of the Immigration Act and to advise the applicants of the results of their application. An application for landing from within Canada should be considered and adjudicated upon if and when the exemption sought from section 9(1) is granted. That application would be subject to whatever rights of appeal are granted by the Immigration Act.

*O'Grady v. Whyte*, [1983] 1 F.C. 719, 138 D.L.R. (3d) 167, 42 N.R. 608 (Fed. C.A.).

The respondent, Whyte, attempted to sponsor his putative daughter who was living in Jamaica. After his daughter arrived in Canada, a sponsorship application was turned over to immigration officials in Hamilton. The respondent was advised that the application could not be dealt with because the daughter did not fall within the definition of the term as it appears in the immigration regulations, section 2(1). *Mandamus* was issued to compel the immigration official to dispose of the application. On appeal this order was set aside due to the fact that no application for permanent residence on behalf of the daughter had been made in Jamaica. An order in council had not been issued under section 115(2) of this Act exempting her from the requirement of section 9(1) (of obtaining a visa before appearing at a port of entry). The Court held that there was no duty upon an immigration official to make a decision on a sponsorship application because the underlying requirement of a landing application had not been met.

*Reece v. Min. of Employment & Immigration*, [1982] 2 F.C. 743, 130 D.L.R. (3d) 724 (Fed. T.D.).

The petitioner applied for the issue of a writ of *mandamus*, ordering the Minister to render a decision on her pending application for permanent residence, and for a writ of prohibition, preventing the holding of an inquiry. The application for *mandamus* was dismissed because there was no requirement for consideration of an application not made from abroad. Accordingly, the application for prohibition also failed.

*Parcho v. Min. of Employment & Immigration*, [1982] 2 F.C. 269, 39 N.R. 498 (Fed. C.A.).

The appellant's case was considered under the 1973 Immigration Amnesty Programme. His case was not finally decided. In 1981, the applicant attempted to go to the United States to deliver an application for a Nigerian passport to a friend in New York. The applicant posed as a Canadian citizen, but was arrested by immigration authorities in the United States and paroled into the United States and ultimately ordered deported from that country. The applicant attempted to return to Canada, but was subject of a section 20 report. At the conclusion of the inquiry, the adjudicator issued an exclusion order because the applicant was not in possession of an unexpired passport, and because he did not have a visa before appearing at a port of entry as is required by section 9(1). The Court upheld the adjudicator's finding and held that the fact that an application had been made under the Immigration Amnesty Programme was of no benefit to the appellant.

*Lawrence v. Min. of Employment & Immigration*, [1980] 1 F.C. 779 (Fed. T.D.).

The Court held that where the sponsoree had no immigrant visa but was present in Canada, the department was required to give the sponsor a decision on her application. As the sponsoree was obligated under a departure notice to leave Canada not later than April 1, 1980, the decision should be made prior to that date. The Court upheld the right of the department to refuse the application on the ground that the sponsoree did not meet the requirements of the Act or Regulations in that he had not applied for or obtained a visa at a visa office outside Canada.

The Court also referred to the anomalous result that occurs where the department



refuses to make a decision on the sponsorship application. Because no decision has been made, the Immigration Appeal Board lacks jurisdiction to entertain, at that stage, an appeal by the sponsor.

### ***Subsection (2)***

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the perspective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.

*Editor's Note:* See, however, section 11.1 of the Immigration Regulations.

*Uy v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 172, 121 N.R. 248, 40 F.T.R. 80 (note) (Fed. C.A.).

This is an appeal from the Trial Division which refused *certiorari* quashing the refusal by a visa officer of the appellant's independent application. The appellant had been a qualified medical doctor in the Philippines and was a resident in pediatrics in the United States when he applied for admission to Canada as a medical technologist. The visa officer refused to assess him in respect of that occupation because he did not believe that the appellant would pursue the occupation in Canada. In doing so, the visa officer

erred in law. There was no suggestion in this case that the visa officer had assessed the appellant for the occupation of medical technologist. The visa officer awarded him 70 or more units and then invoked section 11(3) of the Regulations by reason of his conclusion as to the appellant's intentions. Section 6 of the Act requires a visa officer to assess any immigrant who applies for landing in the manner prescribed by the Act and Regulations. Section 8(1) of the Regulations imposes in mandatory terms a duty to assess and nothing in either the Act or Regulations permits a visa officer to refuse to assess in respect of the occupation or alternative occupations which the immigrant states he or she intends to pursue in Canada. The general discretion given a visa officer by section 9(1) of the Regulations must be subordinated to the particular discretion given by section 11(3) where, notwithstanding the award of at least 70 units, the visa officer is of the opinion that those units do not reflect the chances of the particular immigrant becoming successfully established in Canada. The reasons for that opinion must be committed to writing and submitted to and approved by a senior immigration officer. Accordingly, the appeal was allowed.

*Pinto v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 194, 39 F.T.R. 273 (Fed. T.D.).

*Certiorari* was sought to quash a decision by a visa officer refusing to issue a visa with an employment authorization to Ms. Renny Quadros. Ms. Quadros, a citizen of India and a cousin of the applicant, was offered employment as a live-in domestic worker. Validation of the employment offer was secured from the CEC in Peterborough and forwarded to the Canadian High Commission in New Delhi. A visa officer interviewed Ms. Quadros and refused her application. The applicant obtained a second validation of his offer of employment and forwarded it to the High Commission in New Delhi. Ms. Quadros was interviewed again and her application refused a second time. The applicant obtained a third validation of employment offer and forwarded this to the High Commission in New Delhi. The employment officer in Peterborough sent a covering letter outlining the applicant's unique circumstances in relation to the need for a foreign domestic worker. The applicant was refused again and this application was then brought.

Policy guidelines exist for the employment of foreign domestic workers. The program is described as designed for the professional domestic or nanny able to assume management of a household and care of children or the duties specified within designated occupational qualifications and who are expected to be live-in household domestic workers. The designated occupational classifications include housekeeper, companion, servant, domestic, babysitter, child's nurse and parent's helper as defined in the CCDO. In order to qualify, a prospective temporary worker must meet the requirements set out in relation to the relevant classification. The visa officer was guided strictly by the requirements of the Immigration Manual. There was no recognition that the qualifications possessed by the applicant were to be assessed in view of the requirements of the employment offer. The preponderance of the material filed indicated that, in considering qualifications and experience, the visa officer considered the criteria contained in s. 15.61(c) of the Manual which required, in lieu of formal training, a minimum of one year's satisfactorily related full-time paid employment as a domestic. This requirement exceeded the requirements for specific vocational preparation for the designated job classifications falling within the FDM program as set out in the CCDO. The applicant was a single parent with a teenaged daughter who had taught primary school for 16

years. To conclude that she had no training or experience in aspects of the offer of employment, including the care of an 8-year-old child, a senior couple, cooking, cleaning and regular household duties, showed reliance upon the requirement for formal training or full-time employment rather than a willingness to assess the skills possessed by the applicant as these were relevant to the employment offer.

In assessing the *bona fides* of the employment offer, the visa officer took into account the fact that the applicant had, for some 2½ years, sought to employ the same person. This is a matter beyond the Regulations; it has nothing to do with assessing Ms. Quadros' qualifications for the position offered for the purpose of deciding whether her employment in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada. Assessing the *bona fides* of the offer of employment is not consistent with the responsibility of the visa officer under the Regulations nor is it consistent with the officer's responsibilities under the FDM policy guidelines. Accordingly, *certiorari* was allowed and the decision of the visa officer was set aside.

*Canada (Min. of Employment & Immigration) v. Ho* (1990), 11 Imm. L.R. (2d) 12 (Fed. C.A.).

The visa officer initially awarded the respondent eight points for experience and changed that to "nil" because the officer spoke to someone at CEIC. The discretion of a visa officer to grant an immigrant visa is to be exercised according to law, *i.e.* the Immigration Act and Regulations. A visa officer cannot properly take account of general directives not having the force of law nor instructions from head office particular to the case at hand. Those improperly fetter him in the exercise of the discretion that Parliament, not the Canada Employment and Immigration Commission, has entrusted to him.

*Gill v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 305 (Fed. T.D.).

The applicant was refused under the Last Surviving Family Member Program on the basis that he had been untruthful with the visa officer concerning his marital status. The applicant had denied that he was married. The decision of the visa officer was quashed. The officer received evidence that the applicant had been married. He owed it to the applicant, as a matter of fairness, to have the applicant either confirm or deny the allegation that the applicant was married. The visa officer's failure to do this constituted a fundamental breach of the duty of fairness. The visa officer was directed to resume the processing of the application and to grant the applicant an opportunity to confront the evidence that suggested that he was married and to bring any other relevant evidence to the visa officer's attention before a decision was made.

*Li Yang v. Canada (Min. of Employment & Immigration)* (1989), 36 Admin. L.R. 235, 8 Imm. L.R. (2d) 48, 27 F.T.R. 74 (Fed. T.D.).

This is an application for an order by way of *certiorari* quashing the decision of the respondent refusing the applicant's request for permanent residence in Canada.

Applications for permanent residence under the self-employed provisions involve a two-stage assessment process. The first phase is a paper-screening process in which immigration officials evaluate documents submitted by the applicant and decide if the application process should be continued. If the applicant passes this phase, he is invited



to an interview. One of the most significant factors in any assessment is the applicant's possibility of supporting himself in Canada. Points are therefore awarded for occupational demand in the paper-screening step and for experience in the final assessment. Where an applicant is not awarded any units of assessment for experience, an immigrant visa cannot be issued unless the visa officer believes there are good reasons why the number of points do not reflect the chances of the applicant to become successfully established in Canada and those reasons have been approved by a senior immigration officer. A candidate for self-employment is also subject to the definition of a self-employed person and must be someone who intends and has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the artistic or cultural life of Canada. In addition, the visa officer will award 30 units of assessment to an applicant seeking to be self-employed if it is his opinion that the applicant will be able to become successfully established in his business in Canada.

The purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation.

The applicant is from the People's Republic of China and had been residing in the United States since 1986. In 1987, she applied for permanent residence and stated that she was planning to pursue the profession of a self-employed music teacher. The applicant received training in China in both Oriental and Occidental music. She arrived in the United States on a student visa and was awarded a scholarship and completed a Master's degree in music. The applicant performed extensively in China and participated in one vocal competition in the United States.

The applicant was interviewed and, at the conclusion of the interview, the applicant learned that a decision could not be made until the officer consulted her colleagues and reviewed the requested documents. The applicant hand-delivered the requested documents on November 17, 1987. The applicant received a letter of refusal dated November 16, 1987.

The written refusal concentrated on the visa officer's opinion that the applicant's business would be unsuccessful and that the applicant would not make a significant contribution to the economy or cultural or artistic life of Canada. However, the visa officer's notes, taken during the interview, deal exclusively with the applicant's experience. The visa officer's notes indicate that the refusal was also based on a lack of self-employed experience in the applicant's intended occupation of self-employed music teacher. The Court noted that the applicant was an accomplished musician and had experience as a teacher and concluded that the visa officer had placed an undue emphasis on the applicant's lack of experience as a self-employed teacher and that the interpretation taken by the visa officer made it almost impossible for the applicant to succeed. This interpretation was found to be a fundamental breach of the duty of fairness.

Further, no questions were posed dealing with the possibilities of the applicant's contributions to cultural, economic or artistic life. The officer, at least partially, based her refusal on these criteria and yet did not, at the time of the interview, give any indication of a negative assessment on this basis nor provide the applicant with an opportunity to reply to these criteria.

Finally, the Court noted that the decision made by the officer pre-dated the receipt of the requested documentary information. The decision of the visa officer was set aside

and the respondent was directed to carry out an assessment of the applicant in accordance with the Immigration Act and Regulations in a manner consistent with the interpretation placed upon them in the Court's reasons.

*Dubey v. Canada (Min. of Employment & Immigration)* (1987), 17 F.T.R. 319 (Fed. T.D.).

The Court was requested to quash a refusal, by the respondents, of an application for a visitor's visa on the grounds that the proposed visitor was required in Canada as a witness on behalf of the applicant at an Immigration Appeal Board hearing. The applicant at the hearing was attempting to prove that his marriage to the proposed visitor was *bona fide*. The sponsor in this case had, in fact, married another woman in February 1983 and divorced her in December 1984. In February 1985, less than two months after his divorce was final, the sponsor submitted the sponsorship in question. The sponsoree, when she was questioned about the sponsor, indicated that she knew nothing about him. She did not know his level of education, what he did for a living, and did not know the names of his family members. Further, the immigration officer, who refused the visitor's visa application, noted that in India, where marriages are arranged the prospective partners are well briefed about each other and, thus, are very knowledgeable about the person with whom they have been paired. The officer was found to have been exercising his best judgment and was aware of all the facts when he opted to refuse the application. The Court was not satisfied that no other means existed whereby the evidence of the sponsoree could be reviewed. Further, the Court pointed out that the applicant was seeking an unusual benefit, namely, the admission to Canada of someone whose previous applications for admission to Canada had been refused. No denial of natural justice was found on the facts of this case. There was no evidence that the sponsoree was refused entry because she would testify on behalf of the applicant. The application was dismissed.

*Toor v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 104, 9 F.T.R. 292 (Fed. T.D.).

Visitors' visas were refused to the father, mother, brother and sister of Mr. Toor. He wanted them to come to Canada to testify at his appeal before the Immigration Appeal Board, pursuant to section 79 of the Act, against the refusal to issue immigrants' visas. Two points in issue at the appeal were whether the relatives were really dependants of Mr. Toor and whether Mr. Toor was financially able to maintain them in Canada.

A decision by a visa officer that a person is not a *bona fide* visitor, simply because he wants to come to Canada and testify before the Board, would be an error in law. Here, however, the refusal of the visitors' visas was on the ground that the applicants were not answering truthfully to the questions, that they would resist returning to India once in Canada, and on the grounds that they could not afford the expenses involved. Such a decision is not open, in the absence of bad faith or bias, to review by way of *certiorari*. Accordingly, the application was denied.

*Canada (Min. of Employment & Immigration) v. Tham*, Fed. C.A., Doc. No. A-756-86, September 19, 1986.

A visa officer, following receipt by him of the opinion of a medical officer that the proposed immigrant was described in section 19(1)(a)(ii) of the Act, refused the father's sponsored application for landing. The refusal was communicated to the respondent in

a letter dated September 12, 1983. The respondent's father was not interviewed, however, until September 19, 1983. The Court upheld the Immigration Appeal Board's decision to allow the sponsor's appeal on the basis that, at such an interview, the immigrant could have made representations with respect to the visa officer's proposed refusal that would have changed the visa officer's mind and that it was, therefore, premature and unfair for the visa officer to make his decision on September 12, 1983, seven days prior to the interview.

*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386, 26 C.R.R. 152, 30 D.L.R. (4th) 157 (Fed. C.A.), reversing [1985] 2 F.C. 124, 20 C.R.R. 193, 23 D.L.R. (4th) 564 (Fed. T.D.).

The applicant sponsored his relatives' family class application for permanent residence. The application was denied and the applicant appealed to the Immigration Appeal Board. The visa officer refused to issue visitors' visas to the relatives who were required as witnesses at his appeal. The visas were refused on the basis that the applicants were not *bona fide* visitors because their intention was to testify at the applicant's appeal. An order of *mandamus* was issued requiring the Minister to grant visitors' visas to the relatives to allow them to testify at the appeal. This order was reversed on appeal. *Mandamus* will issue to require performance of a duty; it cannot, however, dictate the result to be reached. *Certiorari* might have been available to quash the refusal of the visitors' visas and to refer the matter back for reconsideration but the respondent had not sought this type of order.

### Subsection (3)

*Gill v. Canada (Min. of Employment & Immigration)* (1991), 49 F.T.R. 285 (T.D.).

The plaintiff, Jhanda Gill, applied for permanent residence from India as a last remaining family member. The application was denied on the basis that he was married and that at his interview he had not been truthful concerning his marital status. The plaintiff had obtained a declaration from a court in India that he was not married, and the immigration officer in charge of his case had refused to rely on the declaration because it had been obtained *ex parte*. The statement of claim was struck out on the basis that the declaration which the plaintiff sought, namely, an order that he had never been married and an order that he had answered truthfully the questions put to him, were requests for declarations of fact. The Court struck out the statement of claim on the basis that only legal rights may be declared and that the determination of the plaintiff's marital status and whether or not he had answered truthfully questions put to him by a visa officer were questions of fact about which the Court could not make a declaration. The Court noted, however, that it was difficult to understand how an officer of the Crown could conclude that he would not accept a valid decision of an Indian court. The fact that the judgment the plaintiff obtained was *ex parte* did not in and of itself make the Indian court's judgment invalid or of no value.

*Sandhu v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 312 (Imm. R.B.).

This was an appeal from a refusal to approve a sponsored application. The Board noted that it had in previous decisions held that section 9(3) of the Act will not apply



as a valid ground for refusal where the false information was not relevant and material in the determination of the admissibility of the applicant and any other legally admissible dependents. The deliberate failure of the applicant to disclose information about his relationship to the appellant's first husband was a misrepresentation of a relevant material fact, however, the refusal by the visa officer on this ground was still invalid because the applicant disclosed the truth about this relationship prior to the decision on the sponsored application. The use of the present tense in section 19(2)(d) indicates that the persons therein described are those who at the time when the decision is made concerning their admissibility do not comply with the Act and Regulations. At the time of the refusal, the applicant had complied with section 9(3) and was not inadmissible under that provision.

*Mundi v. Canada (Min. of Employment & Immigration)* (1985), 63 N.R. 310, 24 D.L.R. (4th) 285 (Fed. C.A.).

This appeal arose from the refusal of a visa officer to approve the application of the appellant's father, Ajmer Singh Mundi, for the landing of himself, his wife, his son, Balwinder, and two daughters. The application had been sponsored by the appellant, who was at all material times a Canadian citizen. Ajmer Singh Mundi forwarded a false-school leaving certificate for the purpose of establishing the date of birth of Balwinder Singh and to prove that Balwinder was under 21 years of age at the time of the application. The failure to satisfy the visa officer, with respect to Balwinder's age, by means of this false school-leaving certificate, did not affect the admissibility of Ajmer Singh, his wife and daughters because the false certificate, respecting Balwinder's age, was not relevant to the admissibility of the other family members. Section 9(3) was not a basis for refusing Ajmer Singh and the other family members because the false certificate was relevant only to Balwinder's admissibility as a dependant and had no bearing on whether the admission of the applicant and the rest of the family was contrary to the Act or Regulations. Further, section 79(1) did not allow the visa officer to refuse the application of the entire family simply because Balwinder was not a dependant and, therefore, not entitled to a visa. The application could only be refused in total if Ajmer Singh, who made the application, did not meet the requirements of the Act or Regulations.

*Kang v. Min. of Employment & Immigration*, [1981] 2 F.C. 807 (Fed. C.A.).

A violation of section 9(3) may, according to the circumstances of the case, justify a decision not to grant a visa. It does not, however, have the automatic effect of making the applicant an inadmissible person.

#### ***Subsection (4)***

*Pinto v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 194, 39 F.T.R. 273 (Fed. T.D.).

*Certiorari* was sought to quash a decision by a visa officer refusing to issue a visa with an employment authorization to Ms. Renny Quadros. Ms. Quadros, a citizen of India and a cousin of the applicant, was offered employment as a live-in domestic worker. Validation of the employment offer was secured from the CEC in Peterborough and forwarded to the Canadian High Commission in New Delhi. A visa officer interviewed Ms. Quadros and refused her application. The applicant obtained a second validation

of his offer of employment and forwarded it to the High Commission in New Delhi. Ms. Quadros was interviewed again and her application refused a second time. The applicant obtained a third validation of employment offer and forwarded this to the High Commission in New Delhi. The employment officer in Peterborough sent a covering letter outlining the applicant's unique circumstances in relation to the need for a foreign domestic worker. The applicant was refused again and this application was then brought.

Policy guidelines exist for the employment of foreign domestic workers. The program is described as designed for the professional domestic or nanny able to assume management of a household and care of children or the duties specified within designated occupational qualifications and who are expected to be live-in household domestic workers. The designated occupational classifications include housekeeper, companion, servant, domestic, babysitter, child's nurse and parent's helper as defined in the CCDO. In order to qualify, a prospective temporary worker must meet the requirements set out in relation to the relevant classification. The visa officer was guided strictly by the requirements of the Immigration Manual. There was no recognition that the qualifications possessed by the applicant were to be assessed in view of the requirements of the employment offer. The preponderance of the material filed indicated that, in considering qualifications and experience, the visa officer considered the criteria contained in section 15.61(c) of the Manual which required, in lieu of formal training, a minimum of one year's satisfactorily related full-time paid employment as a domestic. This requirement exceeded the requirements for specific vocational preparation for the designated job classifications falling within the FDM program as set out in the CCDO. The applicant was a single parent with a teenaged daughter who had taught primary school for 16 years. To conclude that she had no training or experience in aspects of the offer of employment, including the care of an 8-year-old child, a senior couple, cooking, cleaning and regular household duties, showed reliance upon the requirement for formal training or full-time employment rather than a willingness to assess the skills possessed by the applicant as these were relevant to the employment offer.

In assessing the *bona fides* of the employment offer, the visa officer took into account the fact that the applicant had, for some 2½ years, sought to employ the same person. This is a matter beyond the Regulations; it has nothing to do with assessing Ms. Quadros' qualifications for the position offered for the purpose of deciding whether her employment in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada. Assessing the *bona fides* of the offer of employment is not consistent with the responsibility of the visa officer under the Regulations nor is it consistent with the officer's responsibilities under the FDM policy guidelines. Accordingly, *certiorari* was allowed and the decision of the visa officer was set aside.

*Alvero-Rautert v. Canada (Min. of Employment & Immigration)*, [1988] 3 F.C. 163, 4 Imm. L.R. (2d) 139, 18 F.T.R. 50 (Fed. T.D.).

The applicant wanted to sponsor her family, including a brother who was "turning twenty-one." The Canada Immigration Commission was unable to give her an interview until three days before the brother's birthday. The applicant attended at the interview and applied to sponsor her family on that date. The applicant's undertaking was dispatched to Manila by surface mail, and it took approximately one month to arrive at its destination. The Court held that, because the applicant's right to sponsor her family was abrogated, abridged, and infringed by the immigration officer's failure to transmit the applicant's

sponsorship with all deliberate speed, that neither the Immigration Act nor the Regulations should be construed or applied in any way that might block the applicant's family sponsored application for landing. The Court also held that the applicant was subjected to unusual treatment by the immigration officials involved, and that this unusual treatment amounted to denials of equal benefit and equal protection of the law. Accordingly, the respondent's decision in this case was quashed.

*Editor's Note:* The age requirement that bedevilled this sponsorship case has been amended; however, the decision may have a wider import.

*Sashi v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1274-87, July 9, 1987.

The applicant sought to quash a decision of a visa officer in India refusing sponsorship applications for the applicant's mother and his adopted daughter. The visa officer refused to accept the sponsorship of the daughter because, as a result of his inquiries, he concluded that the provisions of the Hindu Adoptions and Maintenance Act had not been complied with. It was held that a visa officer has not only a right but a duty to ensure that all immigrants meet the requirements of the Act and Regulations. In this case, that included making certain that the sponsored child had been legally adopted within the meaning of section 2(1) of the Regulations. The officer's decision was not reached improperly or without justification. The officer did reach a conclusion that involved an interpretation of Hindu law, and he ought to have afforded the applicant some opportunity for counter-argument. However, the relief sought in this case, i.e., *certiorari* and *mandamus*, was discretionary, and in all the circumstances the motion was dismissed.

*Toor v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 104, 9 F.T.R. 292 (Fed. T.D.).

For digest, see section 9, subheading *Subsection (2)*, *supra*.

*Reyes de Jesus v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 217 (Imm. App. Bd.).

This was an appeal from the refusal of a sponsored application for landing. The appellant was seeking to sponsor his mother. The application was refused on the basis that the mother had not satisfied the immigration officer that she complied with the definition of "immigrant" given in section 2(1) of the Immigration Act. This decision was based upon previous statutory declarations, which the mother had filed when she was seeking visitor's visas to come to Canada. These declarations denied an intention to reside permanently in Canada. This was found to be unfair because the declarations from the previous applications, upon which the officer relied, were not raised with the mother when she was interviewed. The Board found that it was the interviewing officer's duty to consider the mother's intention at the time of the interview and to allow her to explain the previous declarations. The Board also suggested that it would be sufficient if the mother's intention to reside permanently in Canada was formulated after the interview, which resulted in her application being rejected, but before the hearing of the sponsor's appeal.



*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386, 26 C.R.R. 152, 30 D.L.R. (4th) 157 (Fed. C.A.), reversing [1985] 2 F.C. 124, 20 C.R.R. 193, 23 D.L.R. (4th) 564 (Fed. T.D.).

For digest, see section 9, subheading *Subsection (2), supra*.

### **APPLICATIONS BY STUDENTS AND WORKERS.**

**10. Except in such cases as are prescribed, every person, other than a Canadian citizen or a permanent resident, who seeks to come into Canada for the purpose of**

- (a) attending any university or college authorized by statute or charter to confer degrees,**
- (b) taking any academic, professional or vocational training course at any university, college or other institution not described in paragraph (a), or**
- (c) engaging in employment**

**shall make an application to a visa officer for and obtain authorization to come into Canada for that purpose before the person appears at a port of entry. 1976-77, c. 52, s. 10; R.S.C. 1985 (4th Supp.), c. 28, s. 4.**

*Pinto v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 194, 39 F.T.R. 273 (Fed. T.D.).

*Certiorari* was sought to quash a decision by a visa officer refusing to issue a visa with an employment authorization to Ms. Renny Quadros. Ms. Quadros, a citizen of India and a cousin of the applicant, was offered employment as a live-in domestic worker. Validation of the employment offer was secured from the CEC in Peterborough and forwarded to the Canadian High Commission in New Delhi. A visa officer interviewed Ms. Quadros and refused her application. The applicant obtained a second validation of his offer of employment and forwarded it to the High Commission in New Delhi. Ms. Quadros was interviewed again and her application refused a second time. The applicant obtained a third validation of employment offer and forwarded this to the High Commission in New Delhi. The employment officer in Peterborough sent a covering letter outlining the applicant's unique circumstances in relation to the need for a foreign domestic worker. The applicant was refused again and this application was then brought.

Policy guidelines exist for the employment of foreign domestic workers. The program is described as designed for the professional domestic or nanny able to assume management of a household and care of children or the duties specified within designated occupational qualifications and who are expected to be live-in household domestic workers. The designated occupational classifications include housekeeper, companion, servant, domestic, babysitter, child's nurse and parent's helper as defined in the CCDO. In order to qualify, a prospective temporary worker must meet the requirements set out in relation to the relevant classification. The visa officer was guided strictly by the requirements of the Immigration Manual. There was no recognition that the qualifications possessed by the applicant were to be assessed in view of the requirements of the employment offer. The preponderance of the material filed indicated that, in considering qualifications and experience, the visa officer considered the criteria contained in

s. 15.61(c) of the Manual which required, in lieu of formal training, a minimum of one year's satisfactorily related full-time paid employment as a domestic. This requirement exceeded the requirements for specific vocational preparation for the designated job classifications falling within the FDM program as set out in the CCDO. The applicant was a single parent with a teenaged daughter who had taught primary school for 16 years. To conclude that she had no training or experience in aspects of the offer of employment, including the care of an 8-year-old child, a senior couple, cooking, cleaning and regular household duties, showed reliance upon the requirement for formal training or full-time employment rather than a willingness to assess the skills possessed by the applicant as these were relevant to the employment offer.

In assessing the *bona fides* of the employment offer, the visa officer took into account the fact that the applicant had, for some 2½ years, sought to employ the same person. This is a matter beyond the Regulations; it has nothing to do with assessing Ms. Quadros' qualifications for the position offered for the purpose of deciding whether her employment in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada. Assessing the *bona fides* of the offer of employment is not consistent with the responsibility of the visa officer under the Regulations nor is it consistent with the officer's responsibilities under the FDM policy guidelines. Accordingly, *certiorari* was allowed and the decision of the visa officer was set aside.

*Grewal v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 100, 99 N.R. 29, 27 F.T.R. 159n, [1990] 1 F.C. 192 (C.A.).

The Immigration Act envisages a two-stage procedure and that after compliance with both stages a visitor may be granted entry to Canada. Stage one is performed outside of Canada by visa officers. Stage two is performed inside of Canada at a port of entry for the most part. Acceptance of a visitor in stage one confers upon that individual a certain status including certain rights of appeal that are not otherwise available. The presumption set out in section 8(2) applies only to the examination by an immigration officer at a port of entry as set out in sections 11 to 18. It does not apply to visa application proceedings pursuant to sections 9 and 10 of the Act.

*Re Mohamed and Min. of Employment & Immigration; Re Abate and Min. of Employment & Immigration* (1981), 130 D.L.R. (3d) 481 (Fed. T.D.), affirmed (1982), 141 D.L.R. (3d) 384 (Fed. C.A.).

In these cases the Court held that a person who has made a claim that he is a Convention refugee may apply for an employment authorization pending the determination of his claim. Refugee status, however, can only be claimed during an inquiry pursuant to section 45(1) [old Act] of the Immigration Act. Therefore, individuals who have been lawfully admitted to Canada under a student or visitor's visa cannot claim refugee status until the student or visitor's status is lost or has expired, and an inquiry commences pursuant to section 27.

*Re Swoboda and Min. of Employment & Immigration* (1981), 130 D.L.R. (3d) 475 (Fed. T.D.).

*Mandamus* was refused because the claimant was in status when the application for the order was launched and thus the Court held that the respondent Minister was justified in refusing to issue an employment authorization, because at that stage the

applicant was not "a person who has made a claim that he is a Convention refugee" as set out in section 19(3)(f) of the Regulations.

*Holden v. Levesque*, [1979] 2 F.C. 141 (Fed. T.D.).

Where an agent of the Minister errs in his interpretation of a regulation and thereby denies without further consideration an application for the renewal of an employment authorization; *mandamus* will issue requiring the respondent Minister to consider the application for renewal in accordance with the provisions of the appropriate regulation.

*Alleyne v. Min. of Manpower & Immigration*, [1977] 2 F.C. 615 (Fed. C.A.).

Notwithstanding that the applicant had an approved offer of employment, the Minister was not required to admit the applicant to Canada, where the applicant was inadmissible as a member of a class of prohibited persons described in the Act.

### **WHERE APPLICATIONS MAY BE MADE.**

10.1 The Minister may specify the places where applications for visas, authorizations and other documents issued or made under this Act may be made and assessed. 1992, c. 49, s. 5.

### **Applications in Canada for Landing**

#### **APPLICATION ON BEHALF OF DEPENDANTS.**

10.2(1) An immigrant who makes an application in Canada for landing may apply on behalf of that person and every dependant in Canada. 1992, c. 49, s. 5.

#### **INFORMATION TO BE SPECIFIED.**

(2) An immigrant who makes an application for landing shall specify in the application

- (a) the prescribed class of immigrants in respect of which the immigrant is applying;
- (b) the names of the immigrant's dependants, whether in Canada or outside of Canada; and
- (c) the province in which the immigrant intends to reside. [1992, c. 49, s. 5. Not in force at date of publication.]

### **Document for Permanent Residents**

#### **DOCUMENT FOR PERMANENT RESIDENTS — *Idem* — Presumption — Form and contents.**

10.3 (1) Subject to the regulations, the Minister shall provide every person



who is granted landing with a document that establishes, in the absence of proof to the contrary, that the person is a permanent resident.

(2) Subject to the regulations, where a visa officer is satisfied that a person outside Canada is a permanent resident, the visa officer shall provide that person with a document that establishes, in the absence of proof to the contrary, that the person is a permanent resident.

(3) Subject to the regulations, a person who does not possess a document provided pursuant to subsection (1) or (2) is presumed, in the absence of evidence to the contrary, not to be a permanent resident.

(4) The Minister may, by order, prescribe the form and contents of any document to be provided for the purposes of subsections (1) and (2). [1992, c. 49, s. 5. Not in force at date of publication.]

### Examinations

*MEDICAL EXAMINATION REQUIRED — Medical examination may be required — Medical examination may be required — Definitions.*

11. (1) Every immigrant and every visitor of a prescribed class shall undergo a medical examination by a medical officer.

(1.1) Every person, other than a permanent resident, who claims to be a Convention refugee shall undergo a medical examination by a medical officer within such reasonable period of time as is specified by a senior immigration officer.

(2) Every visitor and every person in possession of a permit who, in the opinion of an immigration officer or adjudicator, may be a member of the inadmissible class described in paragraph 19(1)(a) may be required by the immigration officer or the adjudicator to undergo a medical examination by a medical officer.

(3) For the purposes of this section, medical examination includes a mental examination, a physical examination and a medical assessment of records respecting a person. 1976-77, c. 52, s. 11; R.S.C. 1985 (4th Supp.), c. 28, s. 5; 1992, c. 49, s. 6.

### Subsection (3)

*Lee v. Canada (Min. of Employment & Immigration)* (1986), 4 F.T.R. 86 (Fed. T.D.).

Early in 1984, the applicant, Sing Lee, of Hong Kong, made an application for permanent residence in Canada for himself and for four of his children, one of whom was the applicant, Hon Man Lee. Hon Man Lee was a congenital deaf mute and he

was rejected on medical grounds. This decision was quashed because both medical officers had failed to consider medical reports, which had been provided by the applicant, prior to certifying that the applicant, Hon Man Lee, was medically inadmissible. This failure to consider these reports was a breach of the duty of fairness, which the respondents owed the applicant.

*Podlaszecka v. Min. of Manpower & Immigration*, [1972] S.C.R. 733, 23 D.L.R. (3d) 331 (S.C.C.).

Before an applicant can be denied permanent residence for failing to undergo a medical examination, there must be evidence that the applicant was asked to provide a medical certificate.

***EXAMINATION BY IMMIGRATION OFFICER — Departure lounges — Where physically outside Canada — Adjournment of examination — Duty to answer questions.***

12. (1) Subject to the regulations, every person seeking to come into Canada shall appear before an immigration officer at a port of entry, or at such other place as may be designated by a senior immigration officer, for examination to determine whether that person is a person who shall be allowed to come into Canada or may be granted admission.

(1.1) For the purposes of this Act, a person who, without leaving Canada, leaves an area at an airport that is reserved for passengers who are in transit or who are waiting to depart Canada may be interviewed by an immigration officer to determine whether the person is seeking to come into Canada.

(2) For the purposes of this section, a person who leaves Canada and thereafter seeks to return to Canada, whether or not that person was granted lawful permission to be in any other country, shall, unless the person is in a prescribed class of persons, be deemed to be seeking to come into Canada.

(3) Where an immigration officer commences an examination referred to in subsection (1), the officer may, in such circumstances as the officer deems proper,

- (a) adjourn the examination and refer the person being examined to another immigration officer for completion of the examination; and
- (b) detain or make an order to detain the person.

(4) Every person shall answer truthfully all questions put to that person by an immigration officer at an examination and shall produce such documentation as may be required by the immigration officer for the purpose of establishing whether the person shall be allowed to come into Canada or may be granted admission. 1976-77, c. 52, s. 12; 1990, c. 44, s. 16; 1992, c. 49, s. 7.

**Subsection (1)**

*R. v. Kwok* (1986), 18 O.A.C. 38, 31 C.C.C. (3d) 196 (Ont. C.A.).

The appellant arrived at Pearson International Airport aboard a flight originating in London. He was examined by a senior immigration officer and detained pending an immigration inquiry. The immigration officer who interviewed the appellant had doubts as to the *bona fides* of the appellant as a genuine visitor and wrote a report pursuant to section 20 of the Act for the benefit of the acting senior immigration officer. A person is not detained within the meaning of section 10 of the Charter of Rights and Freedoms until the restriction on his freedom has gone beyond that required for the processing of his application for entry. The fact that some questioning preceded the advice required by section 10 did not by itself offend the section. The obligation to inform a person of his rights under section 10(b) of the Charter is an obligation to inform, without delay, but that does not mean immediately. Further, the admission into evidence of a conversation preceding the section 10 warning did not bring the administration of justice into disrepute.

*Min. of Employment & Immigration v. Mercier*, Imm. App. Bd., Montreal, Doc. No. 79-1243, September 16, 1980.

The Board held that a change in marital status from single to married was a material fact which must be disclosed to the Canadian immigration authorities if the marriage occurs before permanent resident status is actually granted. By failing to disclose her marriage at Dorval airport when she arrived in Canada, Mme. Mercier misrepresented a material fact and thus brought herself within section 27(1)(e).

Due to the fact that this was an appeal by the Minister, the provisions of section 75(3) applied giving Mme. Mercier an automatic right of appeal on equitable grounds.

This appeal to the Board on equitable grounds was granted because Mme. Mercier had successfully established herself in Canada, and had not committed any criminal offence or infraction of the Immigration Act since the granting of landing in Canada. She had stable employment, had members of her immediate family in Canada who were in a position to help her, if necessary, and, finally, the evidence established that the appellant had a child who was a minor, and a Canadian citizen by birth, and for whom the appellant was the sole provider. This child was in delicate physical health and required regular attention from a competent doctor. Having regard to this evidence, the Board allowed the appellant's appeal on equitable grounds.

**Subsection (2)**

*Parcho v. Min. of Employment & Immigration*, [1982] 2 F.C. 269, 39 N.R. 498 (Fed. C.A.).

The appellant's case was considered under the 1973 Immigration Amnesty Programme. His case was not finally decided. In 1981, the applicant attempted to go to the United States to deliver an application for a Nigerian passport to a friend in New York. The applicant posed as a Canadian citizen, but was arrested by immigration authorities in the United States and paroled into the United States and ultimately ordered deported from that country. The applicant attempted to return to Canada, but was subject of a section 20 report. At the conclusion of the inquiry, the adjudicator issued an exclusion order because the applicant was not in possession of an unexpired passport, and because



he did not have a visa before appearing at a port of entry as is required by section 9(1). The Court upheld the adjudicator's finding and held that the fact that an application had been made under the Immigration Amnesty Programme was of no benefit to the appellant.

*Lee v. Min. of Employment & Immigration*, [1980] 1 F.C. 374, 102 D.L.R. (3d) 328, 30 N.R. 575 (Fed. C.A.).

A student who leaves Canada before the expiry date in his student authorization is, nevertheless, upon his return to be treated as any other person at a port of entry seeking admission to Canada.

*Smalenskys v. Min. of Employment & Immigration*, [1979] 2 F.C. 145, 93 D.L.R. (3d) 388, 24 N.R. 581 (Fed. C.A.).

The appellant had applied for a special consideration under the 1973 Immigration Amnesty Programme; however, through no fault of his own, a hearing into his application was not held. This did not defeat the application. It was held that such a person by voluntarily leaving Canada for short visits did not automatically abandon his application for permanent residence and, unless it was determined that he did intend to abandon his application, a departure notice might not be issued against him.

### **Subsection (3)**

*Dehghani v. Canada (Min. of Employment & Immigration)*, [1993] 1 S.C.R. 1053, 18 Imm. L.R. (2d) 245, 10 Admin. L.R. (2d) 1, 20 C.R. (4th) 34, 101 D.L.R. (4th) 654, 150 N.R. 241, 14 C.R.R. (2d) 1.

The appellant, a citizen of Iran, arrived in Canada without valid travel or identity documents and claimed Convention refugee status. He was interviewed at the secondary examination and extensive written notes were made by an immigration officer, which notes were later entered in evidence at the credible-basis hearing. At the conclusion of that hearing the first level tribunal decided that there was no credible basis to the appellant's claim. When the appellant was taken to a secondary examination at Canadian Immigration at Pearson Airport, he was not detained in the sense contemplated by section 10(b) of the Charter.

Further, the principles of section 10(b) do not require that the appellant be provided with counsel at the pre-inquiry or pre-hearing stage of the refugee claim determination process. The secondary examination of the appellant at the port of entry is not analogous to a hearing. The purpose of the port-of-entry interview was to aid in the processing of the appellant's application for entry and to determine the appropriate procedures which should be invoked in order to deal with the appellant's application for Convention refugee status. The principles of fundamental justice do not include a right to counsel in these circumstances of routine information gathering.

### **Subsection (4)**

*Kang v. Min. of Employment & Immigration*, [1981] 2 F.C. 807, 37 N.R. 551 (Fed. C.A.), leave to appeal to S.C.C. refused (1981), 39 N.R. 353n (S.C.C.).

The failure to respond truthfully to all questions put to him by a visa officer may

justify a decision not to grant a visa but does not have the automatic effect of making the applicant an inadmissible person described in section 19(2)(d).

***WHERE PERSON CANNOT BE PROPERLY EXAMINED — Service of rejection order — Cessation of order.***

13. (1) Where, in the opinion of an immigration officer, a person appearing before the officer for examination cannot for any reason be properly examined, the officer may

- (a) cause the examination to be deferred until such time as that person may be properly examined; or
- (b) make an order for the rejection of that person from Canada.

(2) An order made under paragraph (1)(b) or a copy thereof shall be served on the person against whom it is made and on the owner or master of the vehicle by which that person was brought to Canada.

(3) An order made under paragraph (1)(b) shall cease to be in force or to have effect when the person against whom it was made again appears before an immigration officer and can, in the opinion of the officer, be properly examined by the officer. 1976-77, c. 52, s. 13.

***WHERE PERSON SHALL BE ALLOWED TO COME INTO CANADA — Where immigrant shall be granted landing — Where visitor may be granted entry — Further examination of immigrants — Terms and conditions — Idem — Effect of terms and conditions.***

14. (1) Where an immigration officer is satisfied that a person whom the officer has examined

- (a) has a right to come into Canada,
- (b) is a person in possession of a subsisting permit,
- (c) is a person against whom a removal order has been made who has been removed from or otherwise left Canada but has not been granted lawful permission to be in any other country, or
- (d) is a person returning to Canada in accordance with a transfer order made under the *Mutual Legal Assistance in Criminal Matters Act* who, immediately before being transferred to a foreign state pursuant to the transfer order, was subject to an unexecuted removal order,

the officer shall allow that person to come into Canada.

(2) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant whom the officer has examined, the officer shall

- (a) grant landing to that immigrant, or
- (b) authorize that immigrant to come into Canada on condition that the

immigrant be present for further examination by an immigration officer within such time and at such place as the immigration officer who examined the immigrant may direct.

(3) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant entry to a visitor whom the officer has examined, the officer may grant entry to that visitor and impose terms and conditions of a prescribed nature.

(4) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant who has been authorized pursuant to paragraph (2)(b), 23(1)(b) or 32(3)(b) to come into Canada, the officer shall, after such further examination as the officer deems necessary, grant landing to the immigrant.

(5) An immigration officer who grants landing to an immigrant pursuant to paragraph (2)(a) or subsection (4)

(a) shall, if the immigrant is of a class of immigrants for which regulations made under paragraph 114(1)(ii.2) require the imposition of terms and conditions, impose the terms and conditions prescribed by those regulations; and

(b) subject to regulations made under paragraph 114(1)(ii.4), may, in the case of any immigrant, impose terms and conditions prescribed by regulations made under paragraph 114(1)(ii.3).

(6) Where landing is to be granted to an immigrant under subsection 6(6), an official of the province in which the immigrant intends to reside may, not later than when landing is granted, impose such terms and conditions as are authorized by the laws of the province.

(7) Terms and conditions imposed under subsection (6) have the same force and effect as terms and conditions imposed pursuant to subsection (5). 1976-77, c. 52, s. 14; R.S.C. 1985 (4th Supp.), c. 30, s. 47; 1992, c. 49, s. 8.

### *Subsection (1)*

*Mercier v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-309-85, April 25, 1985, affirmed (1985), 62 N.R. 73 (Fed. C.A.).

On November 17, 1982, following an inquiry, a deportation order was issued against the applicant because he had been convicted of an offence for which a maximum term of imprisonment of 10 years or more may be imposed, pursuant to section 19(1)(c) of the Act. The applicant's appeal against this deportation order was dismissed on August 14, 1984. On January 30, 1985, the applicant tried to gain admission to the United States without success and returned to Canada with the intention of provoking an inquiry where he might claim refugee status. When the applicant reappeared at the Canadian border, a senior immigration officer issued a Summons to Appear at an inquiry, pursuant to section 23 of the Act. That decision was countermanded by another senior immigration



officer and the applicant's case was withdrawn on the ground that the deportation order, issued against the applicant, had never been executed. It was this decision that was attacked by the applicant, who was seeking a writ of *mandamus* requiring the adjudicator to conduct his inquiry. The decision to countermand the Summons to Inquiry was part of the administrative process. The Trial Division did not intervene because it was of the view that the applicant had not been treated unfairly and that to intervene and issue a writ of *mandamus* would create a situation in which the respondent Minister would, on the one hand, have to execute a deportation order against the applicant and, on the other hand, have to conduct an inquiry with a view to admitting the applicant to the country.

An appeal from this decision was heard on June 28, 1985 and dismissed. The appellant (applicant) sought to raise, for the first time, the assertion that the deportation order had been executed by the appellant himself when he left the country for a 6-week visit to Haiti from May 12, 1984 to June 30, 1984. No consideration was given to the submission on appeal because it was a question which was raised for the first time before the Court of Appeal. It was founded upon an allegation of fact which was never put in issue before the Trial Division. The Court noted that when sitting an appeal of the Trial Division, it sat as a Court of Appeal whose function was to decide whether the issues presented at trial were properly disposed of. It was not the Court's duty to determine other issues which, had they been raised at the Trial Division, might have resulted in a different outcome if the necessary factual basis had been established.

### ***Subsection (5)***

*Gabriel v. Min. of Employment & Immigration* (1984), 60 N.R. 108 (Fed. C.A.).

The appellant was landed on condition that she marry within 90 days. This condition could not be obeyed as a result of circumstances beyond the appellant's control. Even though a condition is impossible to fulfil, so long as the person concerned knew of that condition and continued to remain in Canada in breach of that condition, such a person has knowingly contravened a condition attached to the grant of landing. Even if the word "contravene" requires a positive act, the omission to do something which a person is required to do, is the commission of a positive act. It is an act of failure to do something required to be done and, accordingly, satisfies the definition of the term "contravenes".

### ***APPLICATION TO VARY CERTAIN TERMS AND CONDITIONS.***

**15. Where a permanent resident has been granted landing subject to terms and conditions imposed pursuant to subsection 14(5) or (6), the permanent resident may at any time make an application to an immigration officer or to an official of the province, as the case may be, to vary or cancel any of those terms and conditions. 1976-77, c. 52, s. 15; 1992, c. 49, s. 9.**

*Gabriel v. Min. of Employment & Immigration* (1984), 60 N.R. 108 (Fed. C.A.).

The appellant was landed on condition that she marry within 90 days. This condition could not be obeyed as a result of circumstances beyond the appellant's control. Even though a condition is impossible to fulfil, so long as the person concerned knew of that condition and continued to remain in Canada in breach of that condition, such a person has knowingly contravened a condition attached to the grant of landing. Even if the

word "contravene" requires a positive act, the omission to do something which a person is required to do is the commission of a positive act; it is an act of failure to do something required to be done and, accordingly, satisfies the definition of the term "contravenes".

#### **APPLICATION BY VISITOR IN CANADA.**

**16. Subject to section 17.1, any visitor may make an application to an immigration officer**

- (a) to vary or cancel terms and conditions imposed pursuant to subsection 14(3), 17(2), 23(2) or 32(4); or**
- (b) to extend the period during which the visitor is authorized to remain in Canada, except where the visitor was granted entry pursuant to subsection 19(3). R.S.C. 1985 (4th Supp.), c. 28, s. 6.**

*Kouchaki v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-3070-83, November 29, 1984.

The applicant is the plaintiff in a civil action seeking a declaration that the reason for the refusal of the extension of his student visa was unlawful and that he was entitled to remain in Canada to study, effective September 30, 1983. The plaintiff also sought the quashing of the departure notice issued at the conclusion of the inquiry herein. Where the validity of the deportation order is not in question prohibition will not lie to permit the applicant to exhaust all legal remedies. However, if the Minister wishes to refuse extensions, this must be done fairly, which implies the giving of a reason for the refusal. Because the action questions the validity of the decision to refuse to renew a student visa and raises substantial issues, justice required that the applicant be permitted to remain in Canada until trial.

*Kouchaki v. Min. of Employment & Immigration; Shamsvandi v. Min. of Employment & Immigration*, Fed. T.D., Doc. Nos. T-3070-83, T-3096-83, April 6, 1984.

Both of these cases were applications for an interlocutory interim order prohibiting the defendant from proceeding with an inquiry. The plaintiffs entered Canada in 1981 and were authorized to study. Various extensions of this authorization were granted. On September 30, 1983 a further extension was refused and a direction for inquiry was issued and separate inquiries commenced in November 1983. In the main actions the plaintiffs are attacking the validity of the defendants' refusal to extend their authorizations to study. Pending final disposition of these actions, an interlocutory interim order was sought prohibiting the conduct of the inquiry.

An individual permitted to enter Canada to pursue a course of study should, normally, have his student authorization extended to enable him to complete those studies. Where it is alleged that the individual is conducting himself in a manner which is inconsistent with his student status, the respondent Minister is under a duty to act in accordance with the provisions of this Act. Further, the Court does not have a general power to suspend the performance of a statutory duty in cases where the performance of the statutory duty might have an adverse affect on some right which the applicant has sought to assert in another forum. Section 51 of the Immigration Act specifies the cases in

which the execution of a removal order may be stayed. By implication this section excludes any other stay of execution, including one in the exercise of judicial discretion.

The Court should not issue an order directing the respondent not to proceed with an inquiry which he is under a statutory duty to hold solely because the applicants have not exhausted legal remedies available to them.

*Brijcoomar v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-16-84, February 7, 1984.

The respondent Minister refused to extend the applicant's visitor's visa to allow the applicant to remain in Canada pending completion of his appeal to the Immigration Appeal Board. *Mandamus* was refused. *Mandamus* will only be directed against the respondent to require it to deal with an outstanding application when it is refusing to do so.

*Badhwar v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-151-83, December 5, 1983.

The applicants sought an order of *certiorari* to quash the decision not to extend their student visas. The decision not to extend the visas was based on the fact that they had made an application to remain in Canada permanently on humanitarian and compassionate grounds and that such an application was inconsistent with their request to extend their visitor status in Canada. The refusal to extend the visitor's status on this basis was held to be wrong in principle and the application for landed immigrant status was held not in any way to be capable of influencing their status as visitors.

*Parmar v. Min. of Manpower & Immigration*, [1982] 1 F.C. 16 (Fed. T.D.).

The applicant came to Canada as a visitor and received several extensions of his visitor's status. Finally, he went to the immigration office on the date that his status was to expire, which date was a Saturday. The office was closed and the applicant returned on the following Monday for the purposes of obtaining a further extension. The applicant was told that his status had expired and that he was illegally in Canada. A departure notice was issued. It was held that the departure notice was properly issued and that any attempt to extend the applicant's visitor's status, after it had expired, would have been illegal.

***POWER OF IMMIGRATION OFFICER — When application approved — When application refused.***

17. (1) Subject to the regulations, an immigration officer who receives an application made pursuant to section 15 or 16 shall approve or refuse the application.

(2) When an application is approved under subsection (1), the immigration officer may

- (a) vary or cancel any terms and conditions subject to which the person was granted landing or entry;
- (b) add terms and conditions of a prescribed nature; or



(c) in the case of a visitor, extend the period of time during which the visitor is authorized to remain in Canada.

(3) When an application made pursuant to section 16 is refused, the person who made the application shall be allowed to remain in Canada if the period during which the person is authorized to remain in Canada has not expired unless a deportation order is made against that person. 1976-77, c. 52, s. 17; R.S.C. 1985 (4th Supp.), c. 28, s. 7; 1992, c. 49, s. 10.

### *Subsection (2)*

*Badhwar v. Employment & Immigration*, Fed. T.D., Doc. No. T-151-83, December 5, 1983.

The applicants sought an order of *certiorari* to quash the decision not to extend their student visas. The decision not to extend the visas was based on the fact that they had made an application to remain in Canada permanently on humanitarian and compassionate grounds and that such an application was inconsistent with their request to extend their visitor status in Canada. The refusal to extend the visitor's status on this basis was held to be wrong in principle and the application for landed immigrant status was held not in any way to be capable of influencing their status as visitors.

### *NO APPLICATION IN CERTAIN CIRCUMSTANCES.*

17.1 Except in such cases as are prescribed, no person in Canada may make an application to an immigration officer to obtain authorization

- (a) to attend any university or college or take any academic, professional or vocational training course; or
- (b) to engage in employment in Canada. R.S.C. 1985 (4th Supp.), c. 28, s. 8.

### *Visitors' Security Deposits*

*SECURITY THAT VISITORS WILL COMPLY — Where failure to comply — Where security to be returned.*

18. (1) A senior immigration officer may require any visitor or group or organization of visitors arriving in Canada to deposit or arrange for the deposit with the Deputy Minister of such reasonable sum of money or other security as he deems necessary as a guarantee that the visitor or group or organization of visitors will comply with any terms and conditions that may be imposed under this Act.

(2) Where a visitor or group or organization of visitors with respect to whom a sum of money or other security has been deposited pursuant to subsection (1) fails to comply with any term or condition that was imposed, the Deputy

Minister may order that the sum of money deposited be forfeited or that proceedings be taken to realize on the other security deposited.

(3) Where a visitor or group or organization of visitors with respect to whom a sum of money or other security has been deposited pursuant to subsection (1) complies with the terms and conditions that were imposed, the sum of money or other security deposited shall be returned as soon as practicable. 1976-77, c. 52, s. 18.

### *Subsection (2)*

*A.G. Can. v. Khimani* (1985), 50 O.R. (2d) 476, 8 O.A.C. 359 (Ont. Div. Ct.).

The Attorney General of Canada claimed \$2,000 plus interest owing under a performance bond given by the defendant under section 18(1) of the Act. The defendant entered into the performance bond on June 10, 1982 with the result that one, Yasmin Jetha, was permitted to enter Canada as a visitor. The bond guaranteed that the visitor would leave by August 9, 1982, but the visitor left September 22, 1982. The defendant admitted to being aware on August 9, 1982 that the failure of Yasmin Jetha to leave Canada was a breach of the bond. The trial judge refused to give judgment in favour of the plaintiff, Attorney General of Canada, and purported to exercise an equitable jurisdiction set out in section 78(3) of the Courts of Justice Act, S.O. 1984, c. 11. This decision was overturned, it being held that, whatever sympathy the Court may have had for the defendant (respondent), the finding that the terms and conditions of the bond had been breached meant that the Court must enforce payment of the bond.

*Editor's Note:* On the enforcement of bonds, generally, see section 102.

*Gill v. R.* (1978), 88 D.L.R. (3d) 341 (Fed. T.D.).

Where an alien gives a security deposit to guarantee his departure and executes powers of attorney directing payment of the money to a third party upon his departure from Canada, a senior immigration officer may require that the alien forfeit the deposit if he remains in Canada to apply for landed immigrant status and his application is denied. The power of attorney, even though it is on a departmental form, is not an equitable assignment, it is merely a direction to pay a third party any moneys owing to the alien.

## **PART III EXCLUSION AND REMOVAL**

### **Inadmissible Classes**

**INADMISSIBLE PERSONS — Meaning of “senior members . . .” — Inadmissible classes where entry permitted — Discretionary grant of entry.**

**19. (1) No person shall be granted admission who is a member of any of the following classes:**

**(a) Persons who are suffering from any disease, disorder, disability or other**

health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

- (i) they are or are likely to be a danger to public health or to public safety, or
- (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services;

(a) persons who in the opinion of a medical officer concurred in by at least one other medical officer, are persons

- (i) who, for medical reasons, are or are likely to be a danger to public health or to public safety, or
- (ii) whose admission would cause or might reasonably be expected to cause excessive demands, within the meaning assigned to that expression by the regulations, on health or prescribed social services; [1992, c. 49, s. 10. Not in force at date of publication.]

(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support;

(c) persons who have been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more;

(c.1) persons who there are reasonable grounds to believe

- (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

- (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except persons who have satisfied the Governor in Council that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

(c.2) persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in activity that is part of a pattern of criminal activity



planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the *Criminal Code*, the *Narcotic Control Act* or Part III or IV of the *Food and Drugs Act* that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

(d) persons who there are reasonable grounds to believe will

(i) commit one or more offences punishable by way of indictment under any Act of Parliament, or

(i) commit one or more offences that may be punishable under any Act of Parliament by way of indictment, other than offences designated as contraventions under the Contraventions Act, or [1992, c. 47, s. 77. Not in force at date of publication.]

(ii) engage in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment;

(e) persons who there are reasonable grounds to believe

(i) will engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(ii) will, while in Canada, engage in or instigate the subversion by force of any government,

(iii) will engage in terrorism, or

(iv) are members of an organization that there are reasonable grounds to believe will

(A) engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(B) engage in or instigate the subversion by force of any government, or

(C) engage in terrorism;

(f) persons who there are reasonable grounds to believe

(i) have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada,

(ii) have engaged in terrorism, or

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

(A) acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, or

**(B) terrorism,**

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

(g) persons who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence;

(h) persons who are not, in the opinion of an adjudicator, genuine immigrants or visitors;

(i) persons who, pursuant to section 55, are required to obtain the consent of the Minister to come into Canada but are seeking to come into Canada without having obtained such consent;

(j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 6(1.96) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

(k) persons who constitute a danger to the security of Canada and are not members of a class described in paragraph (e), (f) or (g); or

(l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

(1.1) For the purposes of paragraph (1)(l), “senior members of or senior officials in the service of a government” means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes

(a) heads of state or government;

(b) members of the cabinet or governing council;

(c) senior advisors to persons described in paragraph (a) or (b);

(d) senior members of the public service;

(e) senior members of the military and of the intelligence and internal security apparatus;

(f) ambassadors and senior diplomatic officials; and

(g) members of the judiciary.

(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:

(a) persons who have been convicted in Canada of an indictable offence, or of an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years;

(a) persons who have been convicted in Canada of an indictable offence, or of an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, that may be punishable under any Act of Parliament by a maximum term of imprisonment of less than ten years, other than an offence designated as a contravention under the *Contraventions Act*; [1992, c. 47, s. 77; 1993, c. 49, s. 122. Not in force at date of publication.]

(a.1) persons who there are reasonable grounds to believe

(i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years, or

(ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years,

except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

(b) persons who

(i) have been convicted in Canada under any Act of Parliament of two or more summary conviction offences not arising out of a single occurrence, or

(b) persons who

(i) have been convicted in Canada under any Act of Parliament of two or more summary conviction offences not arising out of a single occurrence, other than offences designated as contraventions under the *Contraventions Act*, or [1992, c. 47, s. 77; 1992, c. 49, s. 122. Not in force at date of publication.]

(ii) there are reasonable grounds to believe have been convicted outside Canada of two or more offences, not arising out of a single occurrence,



that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament

where any part of the sentences imposed for the offences was served or to be served at any time during the five year period immediately preceding the day on which they seek admission to Canada;

(c) other members of a family accompanying a member of that family who may not be granted admission or who is not otherwise authorized to come into Canada; or

(d) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders or directions lawfully made or given under this Act or the regulations.

(3) A senior immigration officer or an adjudicator, as the case may be, may grant entry to any person who is a member of an inadmissible class described in subsection (2) subject to such terms and conditions as the officer or adjudicator deems appropriate and for a period not exceeding thirty days, where, in the opinion of the officer or adjudicator, the purpose for which entry is sought justifies admission. 1976-77, c. 52, s. 19; 1980-81-82-83, c. 47, ss. 22, 53; R.S.C. 1985 (3d Supp.), c. 30, s. 3; 1992, c. 47, s. 77; 1992, c. 49, s. 11.

### *Subsection (1)*

#### *Paragraph (a)*

*Deol v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 1 (Fed. C.A.).

This appeal was directed against the decision of the Appeal Division of the Immigration and Refugee Board in which the Board dismissed an appeal from an immigration officer's refusal of an application for landing. The refusal was of a sponsored application of the appellant's widowed mother and her two dependent daughters on the ground that one of the daughters was suffering from mental retardation. There is now considerable authority as to the Board's role *vis-a-vis* the opinions of medical officers. It may not question the medical diagnosis, but when requested, it should enquire into the reasonableness of their conclusion as to the probable demands on government services. The Board did not enquire into the reasonableness of the medical officers' conclusion, but rather assumed from the sole fact of agreement as to the existence of mental retardation that the conclusion was reasonable. The mere invocation of mental retardation leads to no particular conclusion. Mental retardation is a condition covering a wide range of possibilities from the total inability to function to near normality. The concept cannot be used as a stereotype because it is far from a univocal notion. It is not the fact alone of mental retardation that is relevant, but the degree and the probable consequences of that degree of retardation for excessive demands on government services.

The Board had failed to make that assessment in this case and its decision was set aside. It was noted that the two medical officers had entered the sponsored dependent's

intended occupation as "new worker". The tests of admissibility must be relevant to the purpose for which admission is sought. The medical officers may well have imposed a higher standard of medical admissibility because they failed to realize that the daughter in question would enter as a sponsored dependent.

*Wong v. Canada (Min. of Employment & Immigration)*, 42 F.T.R. 209, [1991] 2 F.C. 186, affirmed (1992), 146 N.R. 319 (Fed. C.A.).

In December, 1986, the applicants made an application for permanent residence in Canada. The application was refused because the son, Yiu Ting Wong, was determined to be medically inadmissible. Yiu Ting Wong suffers from Down's syndrome and the refusal was based on the assumption that persons with Down's syndrome tend to develop Alzheimer's disease. The decision was set aside on consent after considerable material was filed disputing this medical conclusion. The visa officer continued to process the application for permanent residence and again refused the applicant, Yiu Ting Wong, on medical grounds. This application was brought alleging that the medical inadmissibility of the applicant had already been conclusively determined and that the matter was now *res judicata*. Estoppel *per rem judicatam* has two species. Cause of action estoppel and issue estoppel. There are three elements of the issue estoppel species of *res judicata*. 1) The same question must have been decided in previous proceedings; 2) the previous proceedings must have been final and 3) the parties to those proceedings must be identical to the parties to the proceeding in which the issue of *res judicata* is raised. The Court determined that the issue in the previous proceedings was not the medical inadmissibility in the generic sense of the applicant, Yiu Ting Wong, but only the issue of the connection between Down's syndrome and Alzheimer's disease. Accordingly there was no basis for the application for the doctrine of *res judicata*. The Court also noted that immigration proceedings are matters of public law and ought to be distinguished from private adversaries disputing a private-law matter of litigation. The Court noted that there was considerable doubt whether the doctrine of *res judicata* applied in this area of public law.

*Seyoum v. Canada (Min. of Employment & Immigration)* (1990), 134 N.R. 233 (Fed. C.A.).

The applicant, an Eritrean, entered Canada on a student visa. While that visa was in effect, the applicant was found unfit, by reason of insanity, to stand trial for murder. The inquiry was convened, alleging that the applicant overstayed as a visitor. The applicant claimed refugee status and a conditional deportation order was made in part on the basis that the applicant was inadmissible under section 19(1)(a) because of the health impairment.

It appeared on the face of the medical notification that the opinion of the medical officers was based entirely on the judicial decision as to the applicant's sanity and not on an independent assessment of medical evidence. The applicant's detention, under a Lieutenant Governor's warrant following the finding of unfitness to stand trial, cannot automatically support the conclusion that he might be reasonably expected to cause excessive demands on health and social services. An independent medical examination must take place before the medical officers give their opinion. The finding that the applicant was described in section 19(1)(a) was accordingly not sustainable. The conditional deportation order was sustained on other grounds.

*Bola v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 14, 107 N.R. 311 (Fed. C.A.).

The majority agreed that the Court of Appeal should refrain from intervening to contradict an honest assessment by the Immigration and Refugee Board of the sufficiency of a medical certificate on the basis of which the visa officer abroad had formed an opinion so long as the assessment was not tainted by any misconception of the law or any patently erroneous understanding of the medical officer's expressed statement of opinion.

The Court of Appeal is sitting in appeal and its role is not to re-do what the Board did as if it was, itself, a second Immigration and Refugee Board. In this particular case, the majority thought that the Board's reasons were clear and accurate as to the law and that the analysis of the medical certificate was carefully made and accordingly the appeal was dismissed.

*Canada (Min. of Employment & Immigration) v. Jiwanpuri* (1990), 10 Imm. L.R. (2d) 241, 109 N.R. 293 (Fed. C.A.).

The visa officer refused to grant the applications for landing which the respondent had sponsored on behalf of her father and her sister. The respondent disputed the refusal and the Immigration and Refugee Board allowed the appeal, a decision from which the Minister appealed to the Court. Members of the Board do not have the expertise required to question the correctness of the medical diagnosis reached by the medical officers. Even with the help of medical witnesses, it is not a function of the Board to do so. The Board is not expected to make a choice between the written opinion of the medical officers and that of other doctors as to the diagnosis of a medical condition of an applicant for landing. The Act has made membership in the inadmissible class in section 19(1)(a) the immediate consequence of the expressed opinion of two medical officers, without providing for a different result, if other doctors could be found who would be of a different opinion. In this case, the Board was therefore wrong in finding that, in the case of the father, the diagnosis of mental retardation was erroneous and incorrect; however, it is within the province of the Board to inquire into the reasonableness of the opinion, although that reasonableness is to be assessed at the time when the visa officer made his decision since it is that decision which is being appealed. The reasonableness of the opinion is not to be assessed strictly on the basis of the facts as they appear to the visa officers or the medical officers and is open to the appellant to show that those facts were wrongly seen or interpreted or that they were insufficient to lead to the conclusion drawn. The decision of the Board, taken as a whole in this case, was to the effect that the opinion of the medical officers was unreasonable. The factors which medical officers must take into account are set out in section 22 of the Regulations. The medical officers, in arriving at their opinion, applied only one relevant factor as set out in section 22. They also applied a number of factors which are not set out in the regulations. Accordingly, the Board was justified in concluding that their opinion was not reasonable.

*Sall v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 179, 29 F.T.R. 176 (Fed. T.D.).

The applicants were refused permanent residence status on medical grounds. In upholding this decision, the Court relied on *Mohamed v. Min. of Employment & Immigration*, [1986] 3 F.C. 90 (C.A.) which observed that it was open to the applicant



to show that the medical officer's opinion was unreasonable. The Court further observed that evidence which simply tended to show that the person was no longer suffering from the medical condition which formed the basis of the medical officer's opinion was not sufficient. The decision of *Stefanska v. Min. of Employment & Immigration* (1988), 6 Imm. L.R. (2d) 66 (Fed. T.D.) observed that the decision must be made by a duly constituted authority acting without abuse of power, in good faith and with objectivity. The Court observed that the diagnosis stated in the medical notification was accurate and fully supported the opinion of the physicians who signed it that these were questions of fact and not of law. Where the entries in the medical notification were so inconsistent with each other that they made the document as a whole incoherent, then, of course, such a medical notification would not constitute the opinion of a medical officer.

*Badwal v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 85, 64 D.L.R. (4th) 561 (Fed. C.A.).

The appellant's father was refused a visa for admission to Canada for health reasons. The Immigration Appeal Board upheld the visa officer's decision and dismissed the appeal. The Federal Court of Appeal allowed the appeal because of the wording of the medical narrative. Certainty in prognosis is not required. The Act requires an expression of probabilities. The use of the word "may" does not automatically mean that the narrative is insufficient where the medical narrative makes excessive demands on the health or social system contingent upon deterioration of the appellant's current state. The corollary must be that, in the absence of deterioration, there will be no excessive demands. Parliament requires a judgment of probability based upon an appreciation of the applicant's present condition. Where the narrative does not address the probability of deterioration, the opinion that the sponsored father's presence in Canada will make excessive demands on the health or social system is self-contradictory.

*Min. of Employment & Immigration v. Sihota*, Fed. C.A., Doc. No. A-76-87, January 25, 1989.

This was an appeal by the Minister of Employment and Immigration from a decision of the Immigration Appeal Board that allowed the respondent's appeal against the refusal of the sponsored application of her father for landing in Canada. The Board erred by finding confusion in the medical notification where none existed. Fairly read, the medical notification clearly supported the visa officer's conclusion and no other. The other ailments disclosed in the notification were not susceptible to the description expressed in the narrative of the medical notification as a "condition which is likely to endanger public health." "Pulmonary tuberculosis possibly active" is amenable to that description. Section 22 of the Immigration Regulations only requires that the medical notification address specifically and clearly those diseases which alone or in combination are relevant to the opinion under section 19(1)(a) of the Act.

*Anvari v. Canada Employment & Immigration Commission*, Canadian Human Rights Tribunal, Doc. No. T.D. 18/88, December 14, 1988; reversed Doc. No. T.D. 2/91, April 23, 1991.

The complaint brought by Mr. Anvari was that the respondent Commission had breached the Canadian Human Rights Act. Mr. Anvari was denied admission to Canada pursuant to section 19(1)(a) of the Immigration Act. The Immigration Act has general

scope to provide a service to the public. Under this Act and its Regulations, the officials involved in the processing of individuals toward landed immigrant status carry out an official duty as agents of the Crown. Therefore, the Tribunal has jurisdiction to make a decision under the Canadian Human Rights Act. In the case of Mr. Anvari, the medical evidence did not meet the tests set out in section 19(1)(a). That section requires evidence of a reasonable expectation to be the least possible evidence needed to satisfy the Act. The Tribunal accepted the statement of a doctor that surgery for scoliosis is purely elective surgery. Accordingly, the evidence from the medical officials of the Immigration Department, whose investigation of this particular case was cursory at best, would not justify the discrimination which Mr. Anvari suffered because of his medical disability. Thus, the Canadian Human Rights Commission ordered the Canada Employment and Immigration Commission to process Mr. Anvari to landed immigrant status forthwith and, in addition, awarded costs against the Commission in the amount of \$3,000.

On appeal, the decision of the Human Rights Review Tribunal was upheld with some slight modifications to the award of compensation to Mr. Anvari.

*Canada (Min. of Employment & Immigration) v. Pattar* (1988), 8 Imm. L.R. (2d) 79, 98 N.R. 98 (Fed. C.A.).

The Immigration Appeal Board must determine, when confronted by medical certificates, whether the certificate contains on its face the clear expression of the medical opinion required to give effect to the inadmissibility enacted by section 19(1)(a) of the Immigration Act. In doing so, the Board must look to the document as a whole. Furthermore, the Court strongly disagreed with the suggestion that a difficulty, or even an impossibility, in determining the exact cause of an observed health disorder or illness were decisive impediments to giving the contemplated certificate. The minority decision sought to distinguish the *Hiramen* case on the basis that the medical officer had failed to fill in the part of the form containing the certificate and had given a narrative and medical profile that were completely incoherent.

The majority concluded, however, that the Board in fact had done nothing more than give an honest assessment of the sufficiency of the certificate and, therefore, that the appeal by the Minister should be dismissed.

*Uppal v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 143, 78 N.R. 152 (Fed. C.A.).

The appellant, a Canadian citizen, sponsored applications for landing of members of the family class, namely his father, mother, one brother and two sisters. The applications were refused by the visa officer. The visa officer relied upon the opinion of two medical officers, as defined in section 2 of the Act. The appellant appealed to the Immigration Appeal Board and sought to adduce medical evidence to contradict the medical officer's diagnosis. The Immigration Appeal Board declined to receive this evidence and dismissed the appeal. The appellant then, pursuant to section 84, appealed to the Court of Appeal. The majority of the Court of Appeal held that the Board was required to receive the additional evidence in considering the correctness of the visa officer's opinion. The minority judgment was of the view that the Board was correct in refusing to receive evidence tendered to contradict the opinion given by the two medical officers. The minority view was that the visa officer was required to base his rejection on the opinion of these two officers and, so long as he properly did that, his opinion was entitled to be sustained.

The opinions of other medical experts on the subject presented to the Board were, in the minority view, not pertinent to the issue of the correctness of the formation of the visa officer's opinion. The Court was unanimous in concluding that the relevant time to be considered by the Board on the appeal was the time of the visa officer's decision and not the time of the Board's hearing of the appellant's appeal.

The Court of Appeal was unanimous in pointing out that a consent judgment has no precedential value. The Court granting a consent judgment is concerned with only two things: the capacity of the parties to agree; and the Court's jurisdiction to make the order that the parties have agreed to ask it to make. Consent judgment reflects neither findings of fact nor a considered application of the law to the facts by the Court.

Finally, the Court unanimously agreed that evidence of the current medical condition of the appellant's father and sister was relevant to the question of whether humanitarian or compassionate considerations existed that would warrant the Board granting special relief.

*Shanker v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-535-86, June 25, 1987.

This was an appeal by a Canadian citizen from a decision of the Immigration Appeal Board dismissing an appeal against refusals of the sponsored applications of the citizen's father, mother and two brothers. The basis for the refusal was the opinion of a medical officer, concurred in by a second medical officer, that the mother was suffering from pulmonary tuberculosis, "possibly active." A visa officer found her inadmissible under section 19(1)(a)(i) of the Immigration Act. At the Immigration Appeal Board hearing, new evidence as to the mother's condition, subsequent to the rejection, was provided. This Court adopted the view that evidence as to the mother's condition, subsequent to the visa officer's refusal, was not relevant to the question of whether that refusal was lawful. It was argued that the medical notification, upon which the refusal was based, had not taken into account the results of subsequent medical inquiries. This argument failed because neither the transcript of the hearing before the Board, nor any document on the record, suggested that there was any response to the request for further medical information. Nor was there any suggestion that the appellant's mother had complied with the request to contact the doctor who examined her so that he might reply to the visa officer.

*Mohamed v. Canada (Min. of Employment & Immigration)*, [1986] 3 F.C. 90, 68 N.R. 220 (Fed. C.A.).

This was an appeal from a decision of the Immigration Appeal Board dismissing an appeal from a refusal to approve a sponsored application for landing made by the appellant's father, mother, brother and sister. The ground for that refusal was that the appellant's mother was medically inadmissible. By the time of the appeal before the Immigration Appeal Board, the mother was no longer suffering from the medical condition that made her inadmissible. The first issue was whether her condition, at the time of the hearing of the appeal, was relevant. Mr. Justice Hugessen and Mr. Justice McQuaid concluded that the medical condition at the time the visa officer refused the application was relevant. The Chief Justice concluded that the relevant medical condition was that which the mother was in at the time of her appeal before the Immigration Appeal Board. The majority were of the view that the fact of the improvement in the mother's medical



condition was relevant to whether special relief should be granted on the appeal pursuant to section 79(2)(b). The Court was unanimous, however, in quashing the Immigration Appeal Board's decision on other grounds.

*Fung v. Canada (Min. of Employment & Immigration)* (1986), 18 Admin. L.R. 260, 4 F.T.R. 118 (Fed. T.D.).

The applicant, Lap Szeto, a Canadian citizen, filed an undertaking of assistance sponsoring his co-applicants for permanent residence. Gun Sui Fung was notified that he appeared to have tuberculosis in June 1982 and he was directed to undergo a one-year course of treatment. In July 1982, Fung attended the Canton City Pulmonary Clinic for the required treatment and testing. In March 1983, Fung was advised to provide a further X-ray. He did so and was immediately rejected. This decision was attacked by a notice of motion seeking a writ of *certiorari* to quash the decision and a writ of *mandamus* directing the respondents to consider and process the applications in accordance with the Immigration Act and Regulations. The application succeeded because the rejection of the applicants occurred before the treatment had run its full course, and because the rejection decision was based on consideration of only three tests results from the Canton clinic, whereas the evidence disclosed that at least 24 such tests had been carried out.

*Hiramen v. Min. of Employment & Immigration* (1986), 65 N.R. 67 (Fed. C.A.).

This appeal was with leave under section 84 of the Immigration Act. The visa officer refused the applicant because his admission would cause, or might reasonably be expected to cause, excessive demands on health or social services. The visa officer's opinion was upheld by the Immigration Appeal Board and both decisions were based on a medical report by Health and Welfare, Canada. The entries on the medical certification were inconsistent with each other to the point of incoherence and, hence, the report could not constitute the opinion of a medical officer concurred in by at least one other medical officer. First, the boxes on the document corresponding to the appropriate subparagraph of section 19 had not been checked. Second, the medical categorizations, as completed in the document, were inconsistent with each other. One categorization suggested that the applicant would respond to treatment and the other suggested that no effective treatment was available. Finally, the statement on the form, to the effect that the applicant's condition "could" deteriorate and her medical condition "may affect her physical as well as mental health," were couched in the language of possibility rather than that of probability, while section 19(1)(a)(ii) of the Act requires an expression of probability. Thus, the appeal was allowed and the decision of the Board and the visa officer was set aside.

*Mangat v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-153-85, February 25, 1985.

The applicant gave a undertaking of assistance to the application for permanent residence of certain of his relatives. The relatives were refused for medical reasons. The Immigration Appeal Board allowed the applicant's appeal because the medical reports, upon which rejection of the family application had been based, had expired. Subsequent to the successful appeal, a new decision was taken that again rejected the applications for permanent residence of the applicant's family. Counsel for the applicant contended that the Board's decision on the first appeal meant that the medical problem, identified in the expired certificates, could no longer be taken into account by the visa officer

even if confirmed by new unexpired certificates. This argument was rejected. The Board was held to have taken no "decision" that the medical problem was to be ignored but, rather, it was concluded that the Board had decided that the condition of rejection had not, as a matter of law, been properly proved and, thus, consideration of new and proper medical evidence was not precluded.

*Mandamus* was granted directing a visa officer to reconsider issuing a visitor's visa. The previous application for a visitor's visa had been rejected on the basis that the applicant had not satisfied relevant health requirements. The Court noted that the circumstances, relevant to medical opinions given under section 19(1)(a) of the Act, are different depending on the purpose and duration for which admission is sought. Here, the only medical opinions that the visa officer could have had available were those prepared in relation to the family's application for admission for permanent residence. Thus, the visa officer's decision to refuse to issue a visa was quashed and *mandamus* was ordered against the respondents requiring that they direct a visa officer to reconsider the question of issuing a visitor's visa to the applicant's family.

*Ahir v. Min. of Employment & Immigration* (1983), 49 N.R. 185, 2 D.L.R. (4th) 163 (Fed. C.A.).

The appellant, a citizen of India, sought to enter Canada to visit her father. She was required to undergo a medical examination after her arrival at a Canadian port of entry. Thereafter, a report was prepared stating, in the opinion of two medical officers, that the appellant's admission to Canada might cause excessive demands on health or social services. An adjudicator ignored this opinion and granted the appellant admission to Canada as a visitor for a period of two months on condition that she not attend any school in Canada and that she not engage in employment. The Minister appealed to the Immigration Appeal Board which set aside the adjudicator's decision. The Court of Appeal quashed the Immigration Appeal Board's ruling and restored the decision of the adjudicator. The relevant test is that the applicant's admission would cause or "might reasonably be expected to cause" excessive demand on health or social services. The medical examinations were done without regard to the prospective status of the appellant. Accordingly, the adjudicator was correct in ruling that the medical opinions were not reasonable because they were formulated on an improper basis using improper criteria.

*Tsang v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 80-9437, February 3, 1981.

The appellant sponsored the application for permanent residence of her father. The father's application was refused on the grounds that he did not satisfy the medical requirements for immigrants and that his admission would cause excessive demands on health or social services. The appellant sought an order from the Immigration Appeal Board directing the Minister to produce the medical information upon which the decision was based. The Board found that the sponsoree, having signed a medical release in his application for permanent residence, authorized the release of medical information by Health and Welfare Canada to the Minister of Employment and Immigration and, thus, found that the Minister was entitled to the medical information, which was in fact in the possession of Health and Welfare Canada. The Board concluded that it had jurisdiction to order production prior to the hearing of the appeal of the medical information sought by the appellant. The order for production was not made in this case because it was

premature as no application for an order to produce had been given to the doctors from Health and Welfare Canada from whom production was sought.

**Paragraph (b)**

*Nicolau v. Canada (Min. of Employment & Immigration)* (1994), 74 F.T.R. 38.

The applicant sought to review a decision by an adjudicator which decided that the applicant was described in section 19(1)(b). The adjudicator was satisfied that the applicant would be able to support herself if she were permitted to work. The applicant could not work in Canada. The witnesses, who testified on behalf of the applicant and indicated a willingness to offer emotional and, to a limited extent, financial support, did not establish that they had made adequate arrangements such that the applicant would not require social assistance.

There was no doubt that the applicant was willing to support herself but the evidence was clear that she was unable to do so because she could not legally work.

The adjudicator's decision in finding the applicant described in section 19(1)(b) was upheld.

*Orantes v. Canada (Min. of Employment & Immigration)* (1990), 34 F.T.R. 184.

The Court criticized very strongly the fact that the application for leave was not filed by the Student Legal Aid Clinic because of the onset of Christmas holidays but nevertheless extended the time for filing a notice seeking leave to appeal. The applicant sought orders in the nature of *certiorari* and *mandamus* in regard to the respondent's having invoked section 19(1)(b) of the Act and their not having invoked section 114(1) of the Act in his favour. The denial of permanent residence was based on the fact that the applicant and his dependents had been in receipt of social assistance since 1986 and that neither his Canadian citizen son nor permanent resident son were in a financial position to sponsor him or his dependents. Section 114(2), it was noted, provides that the Cabinet may by regulation exempt any person from any regulation made under section 114(1). Cabinet cannot repeal, suspend or override or exempt anyone from any provision of the Immigration Act itself, just the regulations. Without parliamentary authority, the Governor-in-Council has no authority to exempt anyone from the law. If parliamentary democracy is to survive in Canada, Parliament must make choices about which foreigners, if any, may be legally admitted for permanent residence and not become helpless in the face of asserted entries by aliens no matter how sympathetic their cases. It takes a certain degree of intellectual toughness to support the principles of democracy in the face of various individuals who seek migration into Canada against the will of the democratically elected representatives of the people. If the Charter is interpreted in such a manner as to obviate the will of Parliament in a matter such as this, it is the sort of frustration which would ultimately destroy national government by amputating the lawful means of governance. Whether it is even appropriate to require genuine refugees to be able to support themselves in this applicant's circumstances is a question of policy which cannot be resolved by a Court since the requirement does not violate the Constitution. Accordingly, the application for leave to appeal was dismissed.



*Jolly v. Min. of Manpower & Immigration*, [1975] F.C. 216, 54 D.L.R. (3d) 277, 7 N.R. 271 (Fed. C.A.).

For a discussion of the phrase “reasonable grounds to believe” although in a different context, see *Jolly v. Min. of Manpower & Immigration*, *infra*, Paragraph (f) of Subsection (1) (s. 19).

### **Paragraph (c)**

*Taei v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 187, 64 F.T.R. 311.

The applicant sought leave for a judicial review to obtain an order compelling the respondent to process his application for landing. The applicant arrived in Canada in 1989 and made a claim for refugee status. His claim was determined affirmatively but before landed immigrant status was granted, the applicant was charged with aggravated assault, attempted murder and extortion and these charges were pending at the time of this application. The respondent had refused to process the application until the criminal charges were disposed of by the courts. Leave to institute judicial review was denied. The presumption of innocence requires the respondent to do nothing but stay the applicant's request for admission until the criminal charges are disposed of. It would be against public policy for the respondent to heedlessly grant permanent resident status until the criminal charges were completed. If the applicant is acquitted, then the respondent should proceed with granting admission. If the applicant is convicted, then he will have disqualified himself from landing.

*Singleton v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

The Court noted that a certificate of the applicant's conviction would be the best evidence of such conviction and that the lack of such a certificate leaves something to be desired in the particularity of the evidence. Where, however, the evidence as a whole is sufficient to support the finding of the adjudicator that the applicant was a person described in section 27(2)(d) of the Immigration Act, an application to set aside such decision will fail.

### **Paragraph (c.1)**

*Lei v. Canada (Solicitor General)* (1994), 74 F.T.R. 67.

The adjudicator held that the applicant was a member of an inadmissible class of persons described in section 19(2)(a.1)(i). The applicant was convicted of reckless driving pursuant to the Rules of the Road of State of Washington. A comparison of the working of the Washington Statute and the Canadian Criminal Code revealed that the Canadian statute is narrower than its American counterpart. When this occurred it was necessary for the adjudicator to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings. This could only be accomplished by obtaining evidence of the circumstances which resulted in the charge in the State of Washington. There was no such evidence before the adjudicator and accordingly, his decision was set aside.

*Taei v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 187, 64 F.T.R. 311.

For digest, see section 19, subheading *subsection (1), Paragraph (c), supra*.

For various meanings that are attached to the word “conviction” and hence “convicted”, see *R. v. McInnis* (1973), 1 O.R. (2d) 1, 23 C.R.N.S. 152, 13 C.C.C. (2d) 471 (Ont. C.A.).

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

It is not a pre-condition to the operation of section 19(1)(c) that the Governor-in-Council shall have considered the question of rehabilitation and be dissatisfied that the person concerned has brought himself within the exception. The report mandated by section 27(1) requires the authorizing immigration officer to possess information that the person concerned has been convicted of the kind of criminal act specified in section 19(1)(c) and to have knowledge that the person concerned has not satisfied the Governor-in-Council as to his rehabilitation.

Policy directives, whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public. The procedural formalities which are required in respect to an immigration officer when initiating a section 27(1) report are minimal, firstly, because this is a purely administrative decision and, second, because the officer when issuing the section 27(1) report is merely the initiator of the inquiry process. An immigration officer before issuing a section 27(1) report is, therefore, not required to give the person concerned an opportunity to answer allegations contained in that report. On the facts, the immigration officer who issued the section 27(1) report had sufficient knowledge and information upon which to base the report; further, the applicant was given full particulars on the allegations against him.

The Court of Appeal adopted the motion’s judge’s findings, that there was nothing irregular in the fact that the high-profile nature of the case placed pressure on the respondent’s representatives to proceed with dispatch.

The requirement of institutional independence is included in the rules of natural justice as well as enshrined in the Charter.

The test for institutional independence is whether a reasonable and right-minded individual, having informed himself of the scheme whereby adjudicators are appointed under the Immigration Act and of the basis upon which they perform their duties, would be likely to conclude that an adjudicator appointed under and acting pursuant to that scheme, more likely than not, would decide fairly the inquiries under the Immigration Act over which he presided. While the case-presenting officers and adjudicators are both civil servants under the direction of the same Minister, they operate in separate and distinct divisions of the Commission. Case-presenting officers have no supervisory role, vis-à-vis adjudicators. They do not report to a common superior and it is only at the apex of the organization chart that their respective hierarchies merge. As far as legal direction is concerned, adjudicators can and do seek advice on difficult legal issues from lawyers on the staff of the Adjudication Directorate, who have no connection or association with the Enforcement Branch. On the subject of monitoring, there is evidence that the monitoring practice focuses primarily on how hearings are conducted; with respect to

security of tenure, adjudicators, like other civil servants, have the protection afforded pursuant to section 31 of the Public Service Employment Act. Additionally, they have the protection of a three-stage grievance procedure. The fact that adjudicators are members of the same bargaining unit as case-presenting officers, is a neutral circumstance that does not give rise to any apprehension one way or the other. The practice of appointing adjudicators to other positions on an acting basis does not give rise to reasonable apprehension of a lack of independence. The Court relied on the uncontradicted evidence of an adjudicator to the effect that the decisions made by him were made independently and without direction from anyone else.

Finally, it was pointed out that the assignment of cases is rationally based; complex cases are usually assigned to the more experienced adjudicators. There was nothing to suggest that particular cases were assigned to particular adjudicators, let alone any evidence to suggest that the adjudicator chosen to conduct this inquiry was chosen on any basis other than the rational basis referred to previously. The Court concluded for these reasons that reasonable persons, reasonably informed, would view adjudicators appointed under the Immigration Act as being independent, keeping in mind the fact that they are for the most part laypersons in the hierarchy of quasi-judicial tribunals; and bearing in mind that their decisions are subject to judicial review by the Court; and that they have all taken an oath of office to "faithfully and honestly fulfill their duties" devolving upon them. Accordingly, the appellant's appeal was dismissed.

*Steward v. Canada (Min. of Employment & Immigration) (No. 1)* (1988), 84 N.R. 236 (Fed. C.A.).

The Court articulated the procedure to be followed when deciding the question of equivalency. It stated and adopted as correct the statement that, whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that the essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries.

"Equivalency" can be determined in three ways:

1. by comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law with a view to determining the essential ingredients of the respective offences;
2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and
3. by a combination of the two.

The Court, using this approach, determined that equivalency had not been established between an Oklahoma offence of arson and a Canadian offence of arson.

*Dayan v. Canada (Min. of Employment & Immigration)* (1987), 78 N.R. 134 (Fed. C.A.).

The applicant, a citizen of Israel, was convicted of an offence involving the theft of money and the use of weapons in Israel. No evidence of any kind was adduced of



Criminal Statutes of Israel, so that a comparison of any provision of Israel's Criminal Statutes with the appropriate provisions of the Canadian Criminal Code was impossible.

"Equivalency" can be determined in three ways:

1. by a comparison of the precise wording in each statute, both through documents and through the evidence of an expert or experts in the foreign law, and determining, therefrom, the essential ingredients of the respective offences;
2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether the evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings; and
3. by a combination of paragraphs 1 and 2.

Because no comparison was possible, the question here was whether the findings of fact established that the essential ingredients of the offence in Canada must have been proven in order to have secured the conviction of the applicant in a court of Israel.

Transcripts of evidence in the record established, beyond doubt, that the applicant was a party to a theft of money to which none of the participants had any colour of right and the stealing of which was unlawful as the list of criminal convictions disclosed. Having accepted all of the evidence, including the fact that the applicant had been convicted of robbery in Israel and that a weapon had been used in the commission of that offence, the adjudicator was entitled to conclude that the applicant had been convicted of an offence punishable under section 302 of the Canadian Criminal Code.

By virtue of section 303 of the Criminal Code, a sentence of more than ten years might have been imposed, and, therefore, the adjudicator had evidence before him in supporting the finding that the applicant was a member of the inadmissible class described in section 19(1)(c) of the Act.

The Court noted that proof of the statutory provisions of the law of Israel ought to have been made in this case. Alternatively, the absence of such provisions in the statute law, if that is the fact, ought to have been established. Reliance on the concept of offences as *malum in se* to prove equivalency with the provisions of the Canadian Criminal Code is a device that should be resorted to only when, for a very good reason, proof of foreign law has been difficult to make, and then only when the foreign law is that of a non-common law country.

*Hill v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 1, 73 N.R. 315 (Fed. C.A.).

The issue here was whether the applicant was inadmissible by virtue of section 19(1)(c) of the Immigration Act. The applicant had been convicted in Texas of an offence of burglary. The only evidence of Texas law before the adjudicator was the production of a copy of two sections of the Texas Penal Code. One of them was a definition of burglary, which stated that a person committed that offence if he entered a habitation or building with the intent to commit a theft. Because the definition of theft as it pertains in the Texas statute was not produced before the adjudicator, the Court could not conclude that Texas law included the important additional requirement that the taking be "without colour of right"; the latter is an essential ingredient of the offence of theft in Canada. Accordingly, the deportation order was set aside.

*Lavi v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. T-83-9929, April 24, 1985.

The Minister contended that the conviction rendered against the husband of the appellant made the husband inadmissible by reason of section 19(2)(a)(i) of the Immigration Act. The refusal letter referred to the equivalent Canadian offences as being either section 233(1) or 233(4) of the Criminal Code. The Board asserted in its decision that the reference in the refusal to those subsections did not restrict the Board to make a determination of whether either of those two provisions was the correct equivalent Canadian offence. The Board, asserted that in making its determination it may, if necessary, explore various other provisions of the Canadian law.

*Editor's Note:* Section 19(2)(a) has been amended, but this principle may still be valid.

*Singleton v. Min. of Employment & Immigration*, Fed. C.A, Doc. No. A-813-83, November 7, 1983.

For digest, see section 19, subheading *Subsection (1), Paragraph (c), supra*.

*Taubler v. Min. of Employment & Immigration*, [1981] 1 F.C. 620 (Fed. C.A.).

In the absence of evidence to the contrary it was presumed that the Austrian law of misappropriation involved the element of *mens rea* and that a conviction under that law indicates that a finding of guilty intent was made.

*Min. of Employment & Immigration v. Fenner*, Imm. App. Bd., Vancouver, Doc. No. V81-6126, December 11, 1981.

The respondent, Fenner, was convicted in the State of Washington following a guilty plea to the offence of "negligent homicide by means of a motor vehicle". This offence is equivalent to that set out under section 203 of the Criminal Code. The respondent, Fenner, was given a deferred sentence which meant that at the end of a period of probation he could request the opportunity to withdraw his guilty plea and have the charge dismissed. This, in fact, occurred in this case. The Board decided that this procedure, unknown to Canadian law, was not equivalent to an absolute or conditional discharge and that the conviction in the first instance remained part of Fenner's record and, therefore, he fell within the provisions of section 19(1)(c). The Board allowed the Minister's appeal and directed the deportation of Mr. Fenner.

*Lee v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. V80-6432, July 21, 1981.

Robbery is basically theft with violence and so falls within the *malum in se* exception and the presumption results that the law of the foreign country coincides with that in Canada.

For an analysis of the method of equivalencing see *Brannson v. Min. of Employment & Immigration* (1980), 34 N.R. 411 (Fed. C.A.).

*Re Anderson and Min. of Employment & Immigration* [1981] 2 F.C. 30, 113 D.L.R. (3d) 243, 36 N.R. 423 (Fed. C.A.).

In attempting to determine which Canadian offence is equivalent to the offence for which the applicant was convicted in the United States, the adjudicator should

determine the precise definition of the offence in the United States, so that he can evaluate the essential ingredients of that offence and thus be in a position to find the equivalent Canadian offence. An order, based on an absence of such evidence, will be set aside.

*Robertson v. Min. of Employment & Immigration*, [1979] 1 F.C. 197, 43 C.C.C. (2d) 354, 91 D.L.R. (3d) 93 (Fed. C.A.).

Section 19(1)(c) of the Act can only be used to deport a person when that person has been convicted of an offence for which the maximum punishment is 10 years' imprisonment at the date of the deportation order. Thus, where at the date of the order the maximum period is under 10 years the applicant may not be deported pursuant to section 19(1)(c) even if the offence carried a maximum term of imprisonment of 10 years at the time the applicant was convicted.

*R. v. Wardley* (1978), 43 C.C.C. (2d) 345 (Ont. C.A.).

Where an accused charged with the indictable offence of possession of marijuana for the purpose of trafficking pleads guilty to the included offence, of possession of marijuana, the plea constitutes a plea of guilty to the indictable offence of possession. The maximum sentence for the conviction of the indictable offence of simple possession governs with respect to penalty.

*Button v. Min. of Employment & Immigration*, [1975] F.C. 277, 55 D.L.R. (3d) 559, 8 N.R. 545 (Fed. C.A.).

One cannot assume that the law of a foreign country coincides with Canadian statute law except where the offence falls within one of the traditional offences commonly referred to as *malum in se*.

For various meanings that are attached to the word "conviction" and hence "convicted", see *R. v. McInnis* (1973), 1 O.R. (2d) 1, 23 C.R.N.S. 152, 13 C.C.C. (2d) 471 (Ont. C.A.).

### **Paragraph (d)**

*Taei v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 187, 64 F.T.R. 311.

For digest, see section 19, subheading *Subsection (1), Paragraph (c), supra*.

For a discussion of the phrase "reasonable grounds to believe" although in a different context, see *Jolly v. Min. of Manpower & Immigration, infra, Paragraph (f) of Subsection (1) (s. 19)*.

### **Paragraph (e)**

For a discussion of the phrase "reasonable grounds to believe" although in a different context, see *Jolly v. Min. of Manpower & Immigration, infra, Paragraph (f) of Subsection (1) (s. 19)*.



**Paragraph (f)**

*Jolly v. Min. of Manpower & Immigration*, [1975] F.C. 216, 54 D.L.R. (3d) 277, 7 N.R. 271 (Fed. C.A.).

The question under this section is not whether the persons subject to the proceeding will engage in or instigate the subversion by force of any government, but whether there are reasonable grounds for believing that the persons will so behave. Even if evidence is given negating this fact, it is only necessary for the Minister to show the existence of reasonable grounds for believing the fact; it is not necessary for the Minister to go further in establishing the subversive character of the persons subject to the proceeding.

**Paragraph (g)**

For discussion of the phrase "reasonable grounds to believe" although in a different context, see *Jolly v. Min. of Manpower & Immigration*, *supra*.

**Paragraph (h)**

*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386, 26 C.R.R. 152, 30 D.L.R. (4th) 157 (Fed. C.A.), reversing [1985] 2 F.C. 124, 20 C.R.R. 193, 23 D.L.R. (4th) 564 (Fed. T.D.).

The applicant sponsored his relatives' family class application for permanent residence. The application was denied and the applicant appealed to the Immigration Appeal Board. The visa officer refused to issue visitors' visas to the relatives who were required as witnesses at his appeal. The visas were refused on the basis that the applicants were not *bona fide* visitors because their intention was to testify at the applicant's appeal. An order of *mandamus* was issued requiring the Minister to grant the relatives visitors' visas to allow them to testify at the appeal. This order was reversed on appeal. *Mandamus* will issue to require performance of a duty; it cannot, however, dictate the result to be reached. *Certiorari* might have been available to quash the refusal of the visitors' visas and to refer the matter back for reconsideration but the respondent had not sought this type of order.

*Min. of Employment & Immigration v. Bechan*, Fed. C.A., Doc. No. A-812-82, May 18, 1983.

Bechan sponsored an application for landing by a member of the family class. The application was refused on the basis that the applicant for landing was a person described in section 19(1)(h). The Federal Court of Appeal upheld the Immigration Appeal Board's decision allowing the appeal on the basis that section 19(1)(h) referred only to immigrants at a point of entry. The applicant had made her application for landing at Port of Spain, Trinidad and, accordingly, the basis for the rejection of her application was invalid. Therefore, the Minister's appeal from the Immigration Appeal Board's decision was dismissed. The Court noted that the sponsor is entitled to be accurately informed of the grounds for the rejection of the application for permanent residence so that proper preparation of the appeal permitted by this Act could be effected.

*Rai v. Min. of Employment & Immigration*, [1981] 1 F.C. 112 (Fed. C.A.).

An adjudication made without regard to the totality of the material before the adjudicator may be overturned on a section 28 application (e.g., the failure of the adjudicator to have regard to the fact that the ticket in possession of the prospective visitor was non-refundable).

*Gill v. Min. of Employment & Immigration*, [1981] 1 F.C. 615 (Fed. C.A.).

An applicant's purpose in being in Canada may be temporary within the meaning of the statute if his intention is to stay as long as the Minister will allow. The Court did say, however, that this conclusion was peculiar to the circumstances of this case.

*Gill v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. 449-80, September 17, 1980.

Evidence that the applicant sought to evade telling the immigration officer at the port of entry of his application for a student visa and of the reason for its refusal could, in all circumstances of the case, support a conclusion that the applicant was not a genuine visitor to Canada.

*Dhesi v. Min. of Manpower & Immigration*, Fed. C.A., Doc. No. A-503-78, December 8, 1978.

Where there is sufficient evidence to support a finding by the adjudicator that the applicant is not a person seeking to come into Canada for a temporary purpose, the Court of Appeal will not disturb the exclusion order made by the adjudicator.

*Chan v. Min. of Manpower & Immigration*, [1978] 1 F.C. 217, 16 N.R. 301 (Fed. C.A.).

The Court of Appeal felt that it was difficult to see how the purpose of a person seeking entry to Canada can be temporary when the duration of the stay is indefinite.

### ***Paragraph (i)***

*Bhawan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1239-87, June 22, 1987.

The applicant sought prohibition to prevent his removal from Canada pursuant to a deportation order dated January 5, 1984. The applicant came to Canada from Fiji as a landed immigrant. He became subject to a deportation order on January 5, 1984 and filed an appeal to the Immigration Appeal Board. While the appeal was pending, the applicant voluntarily returned to Fiji, and, in April 1986, the applicant came back to Canada. Prior to his return to Canada, the applicant's solicitor withdrew the appeal to the Immigration Appeal Board. The applicant's contention that the deportation was carried out by his leaving Canada for Fiji was rejected. The applicant could only leave Canada and select the country for destination with authorization from the Minister, and this was lacking in this case. Accordingly, the applicant had not complied with section 54 [s. 52] and the deportation order, dated January 5, 1984, could be executed to cause the applicant's removal from Canada.

*Mercier v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1512-85, November 17, 1986.

The applicant was admitted to Canada in 1974. Between 1978 and 1984 he was convicted of a number of criminal offences. During this period, on November 17, 1982, he was ordered deported. The applicant returned to his country of origin between May 12 and June 30, 1984. The applicant sought a declaration that the deportation order made against him had ceased to be valid by virtue of section 54 of the Immigration Act. It was held that the voluntary departure of someone who is the subject of a deportation order could only be made under section 54 with leave of the Minister. In the absence of such leave, the applicant could not be said to have carried out the removal order himself.

*Grewal v. Min. of Employment & Immigration*, [1981] 1 F.C. 12, 112 D.L.R. (3d) 30, 37 N.R. 535 (Fed. C.A.).

Where an applicant attempts to re-enter Canada prior to the 12-month period described in section 57(2), such person cannot be excluded by order of an adjudicator made more than twelve months after the time described in section 57(2).

*Vargas-Cataldo v. Min. of Manpower & Immigration*, [1973] F.C. 313, 35 D.L.R. (3d) 748 (Fed. C.A.).

The circumstances surrounding the making of an earlier order of deportation may not be reviewed by an adjudicator conducting an inquiry based on the return of the applicant subsequent to this earlier order.

### **Paragraph (j)**

*Rudolph v. Canada (Min. of Employment & Immigration)* (1992), 73 C.C.C. (3rd) 442, 91 D.L.R. (4th) 686 (Fed. C.A.).

Paragraph 19(1)(j) is not retrospective. Canada adopted legislation which hence forwarded excluded persons from Canada on the basis of their conduct in the past. The double criminality requirement of paragraph 19(1)(j) mandates the notional transfer to Canadian soil of the *actus reus* only and not of the entire surrounding circumstances so as to permit a plea of obedience to *de facto* foreign state authority. In concrete terms, in deciding if the applicant's conduct would have constituted an offence against the laws of Canada, his acts and omissions, but not the entire state apparatus of the foreign country, are transferred to Canada. The fact that the German government ordered or condoned the applicant's conduct during World War II is no defence to a charge of doing the same thing in Canada.

Section 19(1)(j) makes reference to section 7(3.76) of the Criminal Code. That subsection incorporates by reference into Canadian law both customary and conventional international law. Therefore, in determining whether the conduct in question was prohibited by custom or conventional international law, one first looks at international conventions in effect at the time that the conduct occurred. In this particular case the Court considered the Convention on the Laws and Customs of War on Land concluded at the Hague on October 18, 1907. Secondly, the Court looked to customary international law. Such a body of law existed in the period 1943-45 with regard to war crimes and crimes against humanity. Further, the Charter of the International Military Tribunal which



following the end of the war in Europe in 1945 created a tribunal to try war crimes was, in Article 6, declaratory of existing customary international law. Further, the Charter of the International Military Tribunal was expressly recognized and affirmed by Regulation 95(1) of the General Assembly of the United Nations adopted December 11, 1946. These instruments are very strong evidence of the content of existing customary international law during the relevant period.

### ***Subsection (2)***

#### ***Paragraph (a)***

*Kanes v. Canada (Min. of Employment & Immigration)* (1993), 22 Imm. L.R. (2d) 223, 72 F.T.R. 226.

This was an application for judicial review of a decision of the Toronto Refugee Backlog Office refusing the applicant's application for permanent residence because he was considered criminally inadmissible.

The applicant came to Canada in 1986 and made a refugee claim. He heard nothing further with respect to his claim until 1992 when he was asked to fill in a personal information form. The applicant was advised that there was a credible basis for his claim and that pursuant to the backlog procedures his application for permanent residence would be processed from within Canada. While this processing was taking place, the applicant was convicted of the summary offence of failing to remain at the scene of an accident.

In January, 1993 the applicant was contacted by Immigration and asked to provide documentation confirming that the conviction in question was for a summary conviction offence. This confirmation was delivered prior to February 1, 1993, the date on which the current section 19(2)(a) came into force.

The transitional provisions dictated that if the application was still pending on February 1, 1993, then the new section 19(2)(a) would apply and the summary conviction offence would prevent the applicant from receiving permanent residence.

The Court found on the evidence that the application had been accepted prior to February 1, 1993 and that receipt of the confirmation of the applicant's summary conviction was just the last step required to formalize his status as a landed immigrant. Given that the document demonstrating the applicant's criminal admissibility to Canada was delivered prior to the change in legislation, there was no reason to conclude that the applicant ought not to be admitted to Canada. A final decision had been made to grant the application for residence. The application was not still pending at the time the legislation changed.

Accordingly, the matter was referred back to the Immigration department for reconsideration.

*Singleton v. Min. of Employment and Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

For digest, see section 19, subheading *Subsection (1), Paragraph (c), supra*.

*R. v. Wardley* (1978), 43 C.C.C. (2d) 345 (Ont. C.A.).

For digest, see section 19, subsection, *Subheading (1), Paragraph (c.1), supra*.

**Paragraph (a.1)**

*Lei v. Canada (Solicitor General)* (1994), 74 F.T.R. 67.

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Steward v. Canada (Min. of Employment & Immigration) (No. 1)* (1988), 84 N.R. 236 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Lavi v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. T-83-9929, April 24, 1985.

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Taubler v. Min. of Employment & Immigration*, [1981] 1 F.C. 620 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

For an analysis of the method of equivalencing see: *Brannson v. Min. of Employment & Immigration*, [1981] 2 F.C. 141, 34 N.R. 411 (Fed. C.A.).

*Re Anderson and Min. of Employment & Immigration*, [1981] 2 F.C. 30, 113 D.L.R. (3d) 243, 36 N.R. 423 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Potter v. Min. of Employment & Immigration*, [1980] 1 F.C. 609, 108 D.L.R. (3d) 92, 31 N.R. 158 (Fed. C.A.).

This case is an example of the operation of section 19(2)(a). Potter was convicted of receiving stolen goods valued at approximately \$30 (Canadian) in England. The Court held that given the provisions of section 313 of the Criminal Code it was clear that Potter was a person who had committed, outside of Canada, an offence that might be punishable by way of indictment and for which a maximum term of less than ten years might be imposed had the offence been committed in Canada.

*Note:* See also cases referred to under section 19(1)(c) and 19(1)(c.1).

**Paragraph (b)**

*Lei v. Canada (Solicitor General)* (1994), 74 F.T.R. 67.

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Steward v. Canada (Min. of Employment & Immigration) (No. 1)* (1988), 84 N.R. 236 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Libby v. Canada (Min. of Employment & Immigration)* (1988), 50 D.L.R. (4th) 573 (Fed. C.A.).

The appellant sought to review and set aside a decision of the adjudicator issuing a departure notice to the appellant. The appellant was a United States citizen who married a Canadian. The marriage broke down and the Canadian husband withdrew his

sponsorship. The appellant was convicted of theft under \$1,000. Pursuant to that charge, she was required to present herself for fingerprinting, which she failed to do, and she was subsequently convicted of a summary offence for failing to report for fingerprinting. The adjudicator erred in determining that the appellant was a person who had been convicted of two or more offences not arising out of a single occurrence. Both offences had their source in the same event.

*Singleton v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

For digest, see section 19, subheading *Subsection (1), Paragraph (a), supra*.

*Taubler v. Min. of Employment & Immigration*, [1981] 1 F.C. 620 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

*Re Anderson and Min. of Employment & Immigration*, [1981] 2 F.C. 30, 113 D.L.R. (3d) 243, 36 N.R. 423 (Fed. C.A.).

For digest, see section 19, subheading *Subsection (1), Paragraph (c.1), supra*.

### **Paragraph (c)**

*Saini v. Min. of Manpower & Immigration* (1978), 22 N.R. 22, 86 D.L.R. (3d) 492 (Fed. C.A.).

Although this case dealt with the Immigration Act, R.S.C. 1970, the Court, with the consent of counsel for the Crown, set aside a deportation order against the wife of the applicant because she was not herself the subject of a section 22 report.

### **Paragraph (d)**

*Canada (Min. of Employment & Immigration) v. De Decaro*, [1993] 2 F.C. 408, 103 D.L.R. (4th) 564, 155 N.R. 129 (C.A.).

In October, 1988 a visa officer issued an immigrant visa to Ignazio De Decaro. He also issued an immigrant visa to two dependants who were to accompany Mr. De Decaro, namely the respondent and her daughter. Ignazio De Decaro died before coming to Canada. The respondent did come and arrived at Dorval on July 11, 1989 accompanied by her daughter and another child, who was born in the U.S. after Ignazio De Decaro's death. This child had never obtained a visa to Canada.

The respondent then applied for landing for herself and her two children. This was denied on the ground that the respondent's admission contravened section 19(2)(d) of the Immigration Act because the respondent did not meet the requirements of section 9(1) of the Act.

The adjudicator found that when the respondent applied for admission to Canada, she held a valid immigrant's visa since her visa had not been revoked by the proper authorities. The adjudicator found that the respondent's husband's death did not automatically invalidate the visa. Further, the adjudicator found that there was no need to refer to section 12 of the Regulations because that provision did not enact a condition of admission, consequently its infringement did not mean the respondent could not be admitted.



The Appeal Division of the I.R.B. dismissed the Minister's appeal on the basis that the respondent, before appearing at a port of entry, had duly obtained an immigrant visa which had never been revoked or cancelled by the proper authorities and thus the respondent had the right to be admitted to Canada unless she was inadmissible on some other ground than the lack of a valid visa.

The Minister's appeal to the Court of Appeal was allowed. Pratte J.A. held that the definition of "accompanying dependant" illustrated that the visa issued to a person in this class was of a very special type which was issued solely to enable its holder to accompany or follow another person to Canada. The holder of such a visa who applied for admission without the other person accompanying or preceding him or her into Canada did not therefore meet the requirements of section 9(1) of the Act.

Further, after her husband's death the respondent became inadmissible by virtue of section 12 of the Regulations. Her marital status had changed since she obtained her visa and in order to be admitted to Canada she had to establish not only that she was eligible, but also that she met all the conditions for obtaining a visa. The respondent never discharged this burden of proof.

Marceau J.A. agreed that the decision of the Appeal Division should be set aside. He saw no reference in the Act or Regulations to visas which become invalid, are revoked or become ineffective. The technique in his view used to cover cases of changes in the immigrant's status between the time the visa is issued and the time he or she arrives at the Canadian border is contained in section 12 of the Regulations. In his view, issuing an immigrant visa is not the granting of landing. Such issuance simply means that the visa officer has formed the opinion that the applicant meets the requirements of the Act and Regulations for admission to Canada. The visa is evidence of a conclusion by an immigration officer whose function is to determine from outside Canada whether applicants are admissible and that conclusion will usually be accepted by his or her colleague at the port of entry. However, the rule is still that a foreign national arriving in Canada with a view to residing here must satisfy the immigration officer of his admissibility at the port of entry. Section 12 of the Regulations imposes on an immigrant a duty to disclose any change in the facts which may have influenced the issuing of the visa and if there has been such a change, it requires the immigrant to meet new requirements. The visa is not void, but the visa in itself does not confer the right of entry. It is the new requirements of section 12 of the Regulations that must be met.

In Marceau J.A.'s view the respondent could not establish that she met the requirements of section 12 since she was granted a visa in consideration of her husband's presence. The adjudicator accordingly was wrong to think that she met the conditions of admission set out by the Regulation, and the Appeal Division could not confirm the adjudicator's finding on the ground that the Minister had not discharged the burden of proving that the respondent was inadmissible or that her visa had been cancelled, as the Minister was under no burden of proof and cancellation of a visa as a concept does not exist.

Given that the Court intended to allow the appeal, it then had to consider section 73(3). The majority was of the view that the respondent before her husband's death possessed a valid visa. However, after that death it was impossible for the condition attached to the visa to be performed so that the visa ceased to have any validity. Accordingly, section 73(3) conferred no right of appeal to the Appeal Division on the respondent.

Marceau J.A. was of the view that the respondent was in possession of a valid visa and that the matter should be returned to the Appeal Division as it was still under a duty to consider whether on compassionate or humanitarian grounds the respondent should not be removed from Canada.

*Sandhu v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 312 (Imm. R.B.).

This was an appeal from a refusal to approve a sponsored application. The Board noted that it had in previous decisions held that section 9(3) of the Act will not apply as a valid ground for refusal where the false information was not relevant and material in the determination of the admissibility of the applicant and any other legally admissible dependents. The deliberate failure of the applicant to disclose information about his relationship to the appellant's first husband was a misrepresentation of a relevant material fact. However, the refusal by the visa officer on this ground was still invalid because the applicant disclosed the truth about this relationship prior to the decision on the sponsored application. The use of the present tense in section 19(2)(d) indicates that the persons therein described are those who at the time when the decision is made as to their admissibility do not comply with the Act and Regulations. At the time of the refusal, the applicant had complied with section 9(3) and was not inadmissible under that provision.

*Klassen-Funk v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-578-84, October 18, 1984.

The applicant sought admission to Canada while accompanied by her fiancé, a Canadian citizen, whom she subsequently married while in Canada. The applicant was excluded because she was a person described in section 19(2)(d) of the Immigration Act in that she was a person seeking admission to Canada but had not applied for and obtained a visa before appearing at a port of entry. The adjudicator determined that the applicant was not seeking entry as a visitor but, rather, was seeking admission as an immigrant and refused to apply section 19(3) of the Act to such a person. The adjudicator's decision was upheld by the Court which ruled that section 19(3) was intended to permit the adjudicator, in his discretion, to grant limited entry only to those persons who have been determined by the adjudicator to be seeking entry to Canada as visitors.

*Grewal v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. No. V82-6005, January 18, 1984.

This was a sponsorship appeal from the refusal to accept the application for permanent residence of the father of the sponsor and his accompanying dependants. It was possible to establish the relationship of the father, the mother and one brother of the sponsor. It was not possible to establish the relationship of another young man and woman who were alleged to be a brother and a sister of this sponsor. A majority was of the opinion that entry should be denied to only those not proven eligible and that the father, the mother and brother whose relationship to the sponsor was established should be permitted to come to Canada. The minority would have disallowed the application of all the parties because other alleged dependants were inadmissible under the Regulation.

*Kang v. Min. of Employment & Immigration*, [1981] 2 F.C. 807, 37 N.R. 55 (Fed. C.A.), leave to appeal to S.C.C. refused 39 N.R. 353n (S.C.C.).

A violation of section 9(3) may, according to the circumstances of the case, justify a decision not to grant a visa. It does not, however, have the automatic effect of making the applicant an inadmissible person described in this paragraph.

*Sidhu v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-259-80, June 19, 1980.

When a person who appears at a port of entry without an immigrant visa is proceeded against under this paragraph, and testifies that she was not seeking admission as an immigrant, the adjudicator must first determine whether the applicant, at the time of her examination by an immigration officer, had in fact sought admission as a visitor or as an immigrant. Failure to do so will result in the quashing of any order made.

### **Subsection (3)**

*Stuart v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2591-86, April 16, 1987.

This application was made to obtain *certiorari* to quash the respondent's decision not to grant a visitor's visa to the applicant's spouse to enter Canada for the purpose of testifying as a witness at the applicant's appeal hearing before the Immigration Appeal Board. The applicant had sought to sponsor his spouse for entry as a member of the family class, but the respondent claimed that the marriage was entered into only for the purposes of gaining admission to Canada. It was determined that the applicant would be denied a fair hearing if he was prevented from calling his wife as a witness. Her son, who was five years old, was not granted permission to enter Canada. *Certiorari* was granted on condition that the applicant's spouse remain in custody for the purpose of ensuring her immediate return to Guyana after any attendance before the Immigration Appeal Board. The basis for admission was section 19(3) of the Act.

*Manlangit v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 33, 78 N.R. 1 (Fed. C.A.).

This section 28 application was brought to set aside an exclusion order on the basis that the adjudicator who made it "refused to exercise" his jurisdiction under section 19(3) of the Immigration Act.

The applicant arrived in the United States approximately five years prior to this incident. He was engaged to be married to a United States citizen. She went on a day's outing to Bob-Lo Island, an amusement park in the Detroit River. This amusement park is, in fact, in Canada and the applicant was refused readmission to the United States. She was then excluded from Canada on the basis that she was not a genuine visitor. During the course of the inquiry, relief under section 19(3) of the Act was discussed. The adjudicator did not finally determine this matter and made no reference to section 19 in the Reasons for Judgment.

In dealing with the request under section 19(3), an adjudicator is only to have regard to the following factors:



1. that the applicant be a member of an inadmissible class described in section 19(2);
2. that the purpose of the entry justifies admission;
3. if entry is to be granted, the appropriate terms and conditions thereof and for the duration of the stay in Canada.

While the decision in this case did not contain express words of refusal, such words were not required to give the Court jurisdiction under section 28 of the Federal Court Act. The adjudicator's conduct was seen as constituting a refusal. The matter was, accordingly, referred back to the adjudicator for reconsideration and redetermination.

*Klassen-Funk v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-578-84, October 18, 1984.

For digest, see section 19, subheading *Subsection (2), Paragraph (d), supra*.

*Brenner v. Min. of Employment & Immigration*, [1983] 1 F.C. 172 (Fed. T.D.).

The adjudicator determined that the applicant was a person described in section 27(2)(a), because the applicant was inadmissible as a member of a class described in section 19(2)(a)(ii). The applicant applied to the adjudicator for a grant of entry under section 19(3). The adjudicator decided that she had no jurisdiction to entertain the application. A writ of *mandamus* compelling the adjudicator to consider the application under section 19(3) was refused on the ground that her decision brought the person within section 32(6) and, therefore, the adjudicator had no discretion to grant entry to such a person under section 19(3).

*Editor's Note:* See section 16(1)(b) of the Act.

### Removal at Ports of Entry

#### **REPORTS AT PORT OF ENTRY — Temporary exclusion of persons arriving from U.S.**

**20. (1) Where an immigration officer is of the opinion that it would or may be contrary to this Act or the regulations to grant admission to a person examined by the officer or otherwise let that person come into Canada, the officer may detain or make an order to detain that person and shall**

- (a) subject to subsection (2), report that person in writing to a senior immigration officer; or
- (b) allow that person to leave Canada forthwith.

**(2) Where an immigration officer at a port of entry is of the opinion that it would or may be contrary to this Act or the regulations to grant admission to or otherwise let come into Canada a person who is arriving from the United States, the officer may, where a senior immigration officer to whom the officer would otherwise make a report pursuant to paragraph (1)(a) is not reasonably available, direct that person to return to the United States until such time as**

a senior immigration officer is available. 1976-77, c. 52, s. 20; 1992, c. 49, s. 12.

### Subsection (1)

*Chan v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 99 (Fed. T.D.).

The applicant was sponsored by his wife, and, upon the applicant's arrival at Vancouver Airport, the immigration officer who interviewed him signed his record of landing, assisted him in an application for a Social Insurance Card and then advised him that his wife had withdrawn her sponsorship. The applicant knew, prior to leaving Hong Kong, that his wife was seeking a divorce, but he had not been informed that she was withdrawing her sponsorship of his application for permanent residence. A section 20 report was prepared, and, ultimately, an exclusion order was issued. The applicant appealed unsuccessfully to the Immigration Appeal Board. Similarly, an application for leave to appeal to the Federal Court under section 84 was also refused.

At this point, the applicant brought these proceedings in the Trial Division attacking the validity of this section 20 report on the basis that, having been granted landing, any attempt to deal with him as an immigrant seeking landing was unauthorized. The Court determined that section 59 [old Act] precluded attacks by way of *certiorari* on matters confined exclusively to the Immigration Appeal Board. Further, in reaching a conclusion as to whether it had the capacity to hear this appeal, the Immigration Appeal Board was taken to have determined whether the removal order, upon which the appeal was based, was valid.

Finally, reference was made to the rule of administrative law that holds that once a final decision has been reached by a statutory body, the myriad of decisions necessarily made on route to that decision must be taken to have merged in it, and it is no longer subject to judicial review under section 18 of the Federal Court Act. Thus, the Trial Division concluded that it was without jurisdiction to grant relief under section 18, and the application was dismissed.

*R. v. Kwok* (1986), 18 O.A.C. 38, 31 C.C.C. (3d) 196 (Ont. C.A.).

The appellant arrived at Pearson International Airport aboard a flight originating in London. He was examined by a senior immigration officer and detained pending an immigration inquiry. The immigration officer who interviewed the appellant had doubts as to the *bona fides* of the appellant as a genuine visitor and wrote a report pursuant to section 20 of the Act for the benefit of the acting senior immigration officer, Gregory Leithead. A person is not detained within the meaning of section 10 of the Charter of Rights and Freedoms until the restriction on his freedom has gone beyond that required for the processing of his application for entry. The fact that some questioning preceded the advice required by section 10 did not by itself offend the section. The obligation to inform a person of his rights under section 10(b) of the Charter is an obligation to inform, without delay, but that does not mean immediately. Further, the admission into evidence of a conversation preceding the section 10 warning did not bring the administration of justice into disrepute.

*Mercier v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-309-85, April 25, 1985, affirmed (1985), 62 N.R. 73 (Fed. C.A.).

On November 17, 1982, following an inquiry, a deportation order was issued against the applicant because he had been convicted of an offence for which a maximum term of imprisonment of ten years or more may be imposed, pursuant to section 19(1)(c) of the Act. The applicant's appeal against this deportation order was dismissed on August 14, 1984. On January 30, 1985, the applicant tried to gain admission to the United States without success and returned to Canada with the intention of provoking an inquiry where he might claim refugee status. When the applicant reappeared at the Canadian border, a senior immigration officer issued a Summons to Appear at an inquiry, pursuant to section 23 of the Act. That decision was countermanded by another senior immigration officer and the applicant's case was withdrawn on the ground that the deportation order, issued against the applicant, had never been executed. It was this decision that was attacked by the applicant who was seeking a writ of *mandamus* requiring the adjudicator to conduct his inquiry. The decision to countermand the Summons to Inquiry was part of the administrative process. The Court did not intervene because it was of the view that the applicant had not been treated unfairly and that to intervene and issue a writ of *mandamus* would create a situation in which the respondent Minister would, on the one hand, have to execute a deportation order against the applicant and, on the other hand, have to conduct an inquiry with a view to admitting the applicant to the country.

An appeal from this decision was heard on June 28, 1985 and dismissed. The appellant (applicant) sought to raise, for the first time, the assertion that the deportation order had been executed by the appellant himself when he left the country for a 6-week visit to Haiti from May 12, 1984 to June 30, 1984. No consideration was given to the submission on appeal because it was a question which was raised for the first time before the Court of Appeal. It was founded upon an allegation of fact which was never put in issue before the Trial Division. The Court noted that when sitting an appeal of the Trial Division, it sat as a Court of Appeal whose function was to decide whether the issues presented at trial were properly disposed of. It was not the Court's duty to determine other issues which, had they been raised at the Trial Division, might have resulted in a different outcome if the necessary factual basis had been established.

*Singh v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-258-84, September 21, 1984.

The section 20 report convoking the inquiry alleged that the applicant was described in section 19(1)(h) of the Immigration Act. In the course of the inquiry, the applicant testified that he intended to remain permanently in Canada. He was, therefore, a person described in section 19(2)(d) because of his failure to obtain an immigrant visa before appearing at a port of entry contrary to section 9(1) of the Act. The exclusion order was based on sections 19(2)(d) and 9(1). The exclusion order was set aside because the subject of the inquiry must be advised of the allegations against him at the outset of the inquiry and if those allegations are changed, altered or substituted during the course of the inquiry, he must then be advised of the revised allegations and given an opportunity to meet them. This finding was supported by the provisions of sections 29 and 31 of the Regulation and the requirement of procedural fairness.



*Kaur v. Min. of Employment & Immigration* (1984), 58 N.R. 221 (Fed. C.A.).

The applicant sought admission to Canada as an immigrant. Following a report made pursuant to section 20(1) of the Immigration Act, she was made the subject of an inquiry. That inquiry was adjourned after the applicant claimed to be a Convention refugee. During the adjournment the applicant left the country for the United States, was refused permission to enter that country and immediately came back to Canada where she reapplied to be admitted as an immigrant. The inquiry which had been adjourned culminated in an exclusion order. The adjudicator who presided over the inquiry did not lose jurisdiction when the applicant left Canada for the United States. Once a person seeking admission to Canada has been made the subject of an inquiry in order to determine her admissibility, the mere fact that she, after the start of the inquiry either left Canada or manifested an intention no longer to seek admission, does not deprive the adjudicator of his jurisdiction to continue the inquiry.

### **GROUND FOR REMOVAL ORDER.**

**21. Where a removal order is made against any person with respect to whom an inquiry is held as a result of a report made pursuant to subsection 20(1)(a), the removal order against that person may be made on the basis that that person is a member of any inadmissible class. 1976-77, c. 52, s. 21.**

*Frias v. Min. of Manpower & Immigration*, [1974] 2 F.C. 306, 5 N.R. 179 (Fed. C.A.).

It still may be necessary to give a person seeking admission at a port of entry notice of the fact that the removal order is going to be made on a basis other than the basis set out in the report under section 20(1).

### **WHERE PERSON SHALL BE ALLOWED TO COME INTO CANADA.**

**22. Where a senior immigration officer receives a report made pursuant to paragraph 20(1)(a) concerning a person who seeks to come into Canada, the officer shall let the person come into Canada if the officer is satisfied that the person is a person described in subsection 14(1). 1976-77, c. 52, s. 22.**

**WHERE IMMIGRANT SHALL BE GRANTED LANDING — Terms and conditions — Where visitor may be granted entry — Where person not allowed into Canada or granted admission — Exclusion order — Duty to provide information — Inquiry or permission to leave Canada — Reports relating to persons who constitute a danger to the security of Canada — Temporary exclusion by senior immigration officer — Where a person not to be detained, etc. — Copy of report to be made available.**

**23. (1) Where a senior immigration officer receives a report made pursuant to paragraph 20(1)(a) concerning an immigrant, the officer shall**

**(a) grant landing to that immigrant, or**

(b) authorize that immigrant to come into Canada on condition that the immigrant be present for further examination by an immigration officer within such time and at such place as the senior immigration officer may direct,

if the officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to or otherwise authorize that immigrant to come into Canada.

(1.1) A senior immigration officer who grants landing to an immigrant pursuant to paragraph (1)(a)

(a) shall, if the immigrant is of a class of immigrants for which regulations made under paragraph 114(1)(ii.2) require the imposition of terms and conditions, impose the terms and conditions prescribed by those regulations; and

(b) subject to regulations made under paragraph 114(1)(ii.4), may, in the case of any immigrant, impose terms and conditions prescribed by regulations made under paragraph 114(1)(ii.3).

(2) Where a senior immigration officer receives a report made pursuant to paragraph 20(1)(a) concerning a visitor, the officer may grant entry to that visitor and, except in the case of a person who may be granted entry pursuant to paragraph 19(3), impose terms and conditions of a prescribed nature if the officer is satisfied that it would not be contrary to this Act or the regulations to grant entry to that visitor.

(3) Where a senior immigration officer adjourns the examination of a person who is the subject of a report made pursuant to paragraph 20(1)(a) or does not let a person come into Canada pursuant to section 22 and does not grant admission to or otherwise authorize the person to come into Canada pursuant to subsection (1) or (2), the officer may, subject to subsections (4), (4.2) and (6),

(a) detain or make an order to detain the person;

(b) release the person from detention subject to such terms and conditions as the officer deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond; or

(c) impose on the person such terms and conditions as the officer deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

(4) Subject to section 28, where a senior immigration officer receives a report made pursuant to paragraph 20(1)(a) in respect of a person and the senior immigration officer is satisfied that

(a) there is no ground on which an adjudicator would be required to make a deportation order under paragraph 32(5)(a), and

(b) the person is

- (i) a member of a class of persons referred to in paragraph 19(1)(i), or
- (ii) a member of a class of persons referred to in paragraph 19(2)(d) by reason of the fact that the person does not possess a valid and subsisting passport, visa or student or employment authorization and is not a person to whom a document was provided pursuant to section 10.3,

the senior immigration officer shall allow the person to leave Canada forthwith or make an exclusion order against the person.

(4.1) Every person referred to in subsection (4) shall truthfully provide such information as may be required by the senior immigration officer for the purpose of establishing whether the person is to be allowed to come into Canada or may be granted admission.

(4.2) Subject to subsections (4.3) and (5), where a senior immigration officer does not make an exclusion order under subsection (4), or a conditional departure order under subsection 28(1), the senior immigration officer shall

- (a) cause an inquiry to be held concerning the person as soon as is reasonably practicable; or
- (b) allow the person to leave Canada forthwith.

(4.3) Where a senior immigration officer receives a report that a person is a member of an inadmissible class described in paragraph 19(1)(k), the senior immigration officer shall cause an inquiry to be held only if

- (a) in the case of a permanent resident, a certificate has been issued under subsection 40(1) in respect of the person; and
- (b) in the case of a person other than a permanent resident, a certificate has been signed and filed in respect of the person by the Minister and the Solicitor General of Canada in accordance with subsection 40.1(1) and the Federal Court has not quashed the certificate pursuant to paragraph 40.1(4)(d).

(5) Where, pursuant to subsection (4.2), a senior immigration officer is required to cause an inquiry to be held with respect to a person who is arriving from the United States, the officer may, where an adjudicator is not reasonably available to preside at the inquiry, direct that person to return to the United States until such time as an adjudicator is available.

(6) No person shall be detained or ordered detained by a senior immigration officer pursuant to paragraph (3)(a) and any person who has been detained pursuant to subsection 20(1) shall be released from detention by a senior immigration officer pursuant to paragraph (3)(b), unless the senior immigration officer is satisfied that there are reasonable grounds to believe that the person poses a danger to the public or would not appear for an examination or inquiry.

(7) Where a senior immigration officer causes an inquiry to be held



concerning a person with respect to whom a report has been made pursuant to subsection 20(1)(a), the officer shall make a copy of the report available to that person. 1976-77, c. 52, s. 23; 1992, c. 49, s. 13.

### ***Subsection (3)***

*R. v. Kwok* (1986), 18 O.A.C. 38, 31 C.C.C. (3d) 196 (Ont. C.A.).

The appellant arrived at Pearson International Airport aboard a flight originating in London. He was examined by a senior immigration officer and detained pending an Immigration inquiry. The immigration officer who interviewed the appellant had doubts as to the *bona fides* of the appellant as a genuine visitor and wrote a report pursuant to section 20 of the Act for the benefit of the acting senior immigration officer. A person is not detained within the meaning of section 10 of the Charter of Rights and Freedoms until the restriction on his freedom has gone beyond that required for the processing of his application for entry. The fact that some questioning preceded the advice required by section 10 did not by itself offend the section. The obligation to inform a person of his rights under section 10(b) of the Charter is an obligation to inform, without delay, but that does not mean immediately. Further, the admission into evidence of a conversation preceding the section 10 warning did not bring the administration of justice into disrepute.

*Monfort v. Min. of Employment & Immigration*, [1980] 1 F.C. 478, 105 D.L.R. (3d) 463, 30 N.R. 174 (Fed. C.A.).

The applicant has no right to be advised of his right to counsel before a senior immigration officer has made a decision to convene an inquiry. Procedural fairness requires that a person seeking admission be advised of his right to counsel at the subsequent inquiry.

## **Loss of Status**

***WHERE PERSON CEASES TO BE PERMANENT RESIDENT — Where residence deemed abandoned.***

**24. (1) A person ceases to be a permanent resident when**

- (a) that person leaves or remains outside Canada with the intention of abandoning Canada as that person's place of permanent residence; or**
- (b) a deportation order has been made against that person and the order is not quashed or the execution thereof is not stayed pursuant to subsection 73(1).**

**(2) Where a permanent resident is outside Canada for more than one hundred and eighty-three days in any one twelve month period, that person shall be deemed to have abandoned Canada as his place of permanent residence unless that person satisfies an immigration officer or an adjudicator, as the case may be, that he did not intend to abandon Canada as his place of permanent residence. 1976-77, c. 52, s. 24.**

**Subsection (1)**

*Canada (A.G.) v. Chanoine* (1987), 4 Imm. L.R. (2d) 136, 15 F.T.R. 143 (Fed. T.D.).

The Attorney General applied for a *Writ of Certiorari* and a *Writ of Mandamus* setting aside the decision of an adjudicator not to hold an inquiry concerning the respondent and ordering the adjudicator to proceed with the inquiry.

The respondent was given the status of a permanent resident and subsequently left Canada for a period of 3 years. Just before returning to Canada, the respondent unsuccessfully applied for a visitor's visa. The respondent entered Canada and made no disclosures of any kind to the officer at the port of entry. A report was prepared indicating that the respondent was a person described in section 27(2)(b) and 27(2)(g) of the Immigration Act. The adjudicator declined jurisdiction, adopting the argument that the respondent should have been proceeded with under section 27(1), which applied to permanent residents.

This decision of the adjudicator was set aside and the adjudicator was directed to continue the inquiry.

A permanent resident has been defined as a person who has been granted landing and who has not ceased to be a permanent resident pursuant to section 24(1). Accordingly, the respondent automatically lost his permanent resident status, pursuant to section 24(1), by reason of his having been outside Canada for more than 183 days, unless he satisfied the adjudicator that he had not done so.

*Editor's Note:* This case should be read with *Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273 (Fed. C.A.).

*Han v. Min. of Employment & Immigration* (1984), 6 Admin. L.R. 25, 52 N.R. 274 (Fed. C.A.).

A person granted permanent resident status who fails to comply with the condition attached to that status, namely that he marry within 90 days, is, nevertheless, a permanent resident notwithstanding his failure to comply with this condition.

*Eyzaguirre v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9268, December 11, 1980.

The appellant was compelled into a series of actions by her husband who made the ultimate decisions on everything which affected the lives of the family members. These actions resulted in the appellant abandoning Canada and returning to Chile to live permanently. The appellant then separated from her husband in Chile and, upon obtaining custody of her children and an exit permit from that country, immediately returned to Canada. The Court held that where there is a lengthy absence from Canada that absence must be reasonably explained and that the Board must be satisfied that the absence and delay in returning to Canada were not motivated by any intention to abandon Canada permanently. In this case the appellant was absent from Canada from 1974 until 1978. Having regard to the finding of the Board (that the husband had foisted his intentions upon his wife), the appellant's appeal was allowed and a deportation order against her quashed.

*Daniels v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 80-925, November 27, 1980.

The Board determined on all the evidence that the appellant was not a permanent resident and, therefore, did not have a right of appeal pursuant to section 72 [s. 70] of the Immigration Act and, thus, dismissed his appeal. The appellant had returned to Scotland to live with his wife and family who had adamantly refused to live in Canada. The appellant was faced with a difficult choice between abandoning Canada as his place of permanent residence or abandoning his family. The Board held that the appellant exercised the difficult choice and established his permanent residence in Scotland. They sought to make a distinction between cases where the individual left Canada for a temporary purpose or a limited duration and returned as soon as the temporary condition was resolved, and cases where the person was not voluntarily residing outside of Canada but was forced to do so due to circumstances beyond the individual's control. In cases such as this one the decision to leave was voluntary and neither element of residence, neither bodily residence nor intent, was met, with the result that permanent resident status in Canada was lost.

*Min. of Employment & Immigration v. White*, Imm. App. Bd., Montreal, Doc. No. 80-1005, October 22, 1980.

The Board held that there were two elements of this section: the departure from and the remaining outside Canada, and the intent to abandon Canada as a place of permanent residence. In this case the Board agreed with the adjudicator's decision and dismissed the Minister's appeal. Michelle White left Canada because she was forced to follow her father, and, therefore, her absence from Canada was fully explained; second, her absences and delays in returning to Canada were not motivated by any intention on her part to abandon permanent residence in Canada. The appellant had returned to Canada temporarily on more than one occasion while completing her studies in Jamaica.

The Board also approved of the notion that the word "residence" or "residing in Canada" should be given a liberal interpretation in order to further the stated objectives of the Immigration Act. Two fundamental elements essential to create a residence are bodily residence in a place and the intention of remaining in that place. It added that neither bodily presence alone, nor intention alone will suffice. Thus, residence can only be changed by the union of fact and intent.

This case contains a very helpful review of many authorities dealing with the elements of section 24.

*D'Souza v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9012, October 8, 1980.

When the appellant was 11 years of age he was granted landing with his parents and sisters. His family remained in Canada for four months and then left. Three years later when the appellant was 14 years of age, he returned to Canada and announced his intention to remain in Canada as a permanent resident. The Board held that the appellant could not, at the age of 11, have formed the decision to abandon Canada as his place of permanent residence. The appellant, upon his return to Canada was 14 years of age and, was held to be capable at that time of forming an intent to return to Canada and establish his permanent residence in Canada. It was held that the appellant could



not be deemed to have abandoned Canada as his place of permanent residence and, therefore, was not a person described under this section.

*Min. of Employment & Immigration v. Hass*, Imm. App. Bd., Vancouver, Doc. No. 79-6130, February 6, 1980.

The Board ruled that the adjudicator was right in finding that the respondent was a permanent resident notwithstanding the fact that Hass was a citizen of West Germany who at the age of 29 was admitted to Canada as a landed immigrant and remained in Canada for a period of only 3 months before leaving the country for 12 years to look after his sick mother. The Board upheld the adjudicator notwithstanding that on his return to Canada in 1979, Hass's passport was stamped with a "visitor's visa" for 7 days.

*Re Roberts* (1978), 92 D.L.R. (3d) 76 (Fed. T.D.).

The effect of these provisions is that where a person has been admitted to Canada as a permanent resident but leaves Canada for extended periods of time in the course of his employment, he does not lose his status if he can show that he did not intend to lose it. The possession of a returning resident permit is *prima facie* proof thereof.

*Adams v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9455, October 3, 1978.

There were two fundamental elements essential to the creation of a residence:

1. bodily residence in that place; and
2. the intention of remaining in that place.

Neither bodily presence alone nor intention alone is sufficient to create a residence. Residence can only be changed by the union of fact and intent and that in order to accomplish change of residence, there must be intent accompanied by the fact of abode.

*Alexander v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9138, July 18, 1978.

The appellant, a citizen of Egypt, was landed in Canada in 1968. His mother, in Egypt, became ill in 1972 and he left Canada to look after her, leaving some personal effects here at his brother's home. Due to the sickness of his mother and then his sister, the appellant remained in Egypt until 1978. When the appellant returned to Canada he was admitted as a visitor and on one occasion had his visitor's visa renewed. The Board held that Alexander had not lost his permanent residence status.

The Board further held that it had the power to determine whether a person was a permanent resident and, thus, to determine whether it had jurisdiction to hear the appellant's appeal. In this case, it found that it had jurisdiction to entertain the appeal pursuant to section 72(1) of the Act and that the appellant had, pursuant to section 4(1) of the Act, the right to come into Canada and, therefore, on his return to Canada did not have to be in possession of an immigrant visa.

*Webber v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9125, June 14, 1978.

The appellant was landed in Canada in 1971, he left in 1975 to return to South

Africa to care for his children and to arrange for them to join him in Canada. Due to lack of funds he left with a one way ticket only. The Board found that the appellant family's circumstances and finances were such that he was obliged to remain in South Africa until 1978 and, therefore, ruled that the appellant had retained his permanent resident status in Canada.

### ***Subsection (2)***

*Canada (A.G.) v. Chanoine* (1987), 4 Imm. L.R. (2d) 136, 15 F.T.R. 143 (Fed. T.D.).

For digest, see section 24, subheading *Subsection (1)*, *supra*.

*Editor's Note:* This case should be read with *Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273 (Fed. C.A.).

*Papadopoulos v. Min. of Employment & Immigration*, Imm. App. Bd., Doc. No. T-83-9231, June 7, 1983.

The appellant became a landed immigrant in Canada at such a young age that he was unaware of this fact. The appellant left Canada shortly after becoming a landed immigrant and returned to Greece with his parents. Fourteen years later, when the appellant applied for and obtained a visitor's visa to Canada with permission to study, the appellant overstayed his visa and in the course of his inquiry produced evidence of his previously having been granted landed immigrant status. The appellant could *not* be said to have not intended to abandon Canada as his place of permanent residence when he left with his parents because the appellant at that time did not know that he had the status of a landed immigrant. Accordingly, the appellant's appeal was dismissed and a deportation order against him was held to be valid.

*Khairulla v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9123, April 24, 1979.

Due to the fact that the appellant had been out of Canada in excess of 183 days in a 12-month period, there was a rebuttable presumption that the appellant had abandoned his permanent residence in Canada. The Board held that the onus is on the appellant to satisfy, firstly, the immigration officer, then the Immigration Appeal Board, that he had not abandoned Canada as his place of permanent residence.

### ***APPLICATIONS FOR RETURNING RESIDENT PERMITS — Proof of intention.***

25. (1) Where a permanent resident intends to leave Canada for any period of time or is outside Canada, that person may in prescribed manner make an application to an immigration officer for a returning resident permit.

(2) Possession by a person of a valid returning resident permit issued to that person pursuant to the regulations is, in the absence of evidence to the contrary, proof that the person did not leave or remain outside Canada with the intention of abandoning Canada as his place of permanent residence. 1976-77, c. 52, s. 25.

**APPLICATION OF SECTION 24 — Exception.**

25. (1) Section 24 applies only in respect of persons who left Canada before the day on which this section comes into force and who do not possess a valid returning resident permit described in section 25 of this Act as that section read immediately before that day.

(2) Possession by a person of a valid returning resident permit referred to in subsection (1) is, in the absence of evidence to the contrary, proof that the person did not leave or remain outside Canada with the intention of abandoning Canada as the person's place of permanent residence. [1992, c. 49, s. 14. Not in force at date of publication.]

**Subsection (2)**

*Re Roberts* (1978), 92 D.L.R. (3d) 76 (Fed. T.D.).

The effect of these provisions is that where a person has been admitted to Canada as a permanent resident but leaves Canada for extended periods of time in the course of his employment, he does not lose his status if he can show that he did not intend to lose it. The possession of a returning resident permit is *prima facie* proof thereof.

**WHERE PERSON CEASES TO BE PERMANENT RESIDENT.****25.1 A person ceases to be a permanent resident when**

- (a) subject to the regulations, the person ceases to ordinarily reside in Canada; or
- (b) a removal order has been made against that person and the order is not quashed or the execution thereof is not stayed pursuant to subsection 73(1). [1992, c. 49, s. 14. Not in force at date of publication.]

**WHERE PERSON CEASES TO BE VISITOR — *Idem*.****26. (1) A person ceases to be a visitor in Canada when**

- (a) that person fails to comply with any term or condition subject to which he is authorized to remain in Canada;
- (b) without authorization, that person attends any university or college, takes any academic, professional or vocational training course or engages in employment in Canada;
- (c) that person remains in Canada for a period of time greater than that for which he is authorized to remain in Canada;
- (c.1) that person enters Canada as or to become a member of a crew of a vehicle and ceases to be a member of the crew or fails to become a member of the crew within the time specified in any terms and conditions subject to which the person was granted entry or, if no time is specified, within forty-eight hours after being granted entry; or



(d) a departure order or deportation order has been made against that person that is not quashed or the execution of which is not stayed pursuant to subsection 73(1).

(2) Unless otherwise specified in writing by an immigration officer or adjudicator, a visitor is not authorized to remain in Canada for a period in excess of three months from the day on which the visitor is granted entry, except where a longer period of time is prescribed by the regulations. 1976-77, c. 52, s. 26; 1992, c. 49, s. 15.

### *Subsection (1)*

### *Paragraph (b)*

*Miles v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1121-83, February 13, 1984.

The Court upheld the decision of an adjudicator finding that the applicant had engaged in employment without authorization and that thereafter the applicant was in breach of one of the conditions of her entry to Canada as a visitor. The Court upheld the adjudicator's finding that the applicant was, therefore, a person described in section 27(2)(e) of the Immigration Act and subject to an inquiry.

*R. v. Malhotra (No. 1)*, [1981] 2 W.W.R. 563, 57 C.C.C. (2d) 539 (Man. Prov. Ct.).

Where there is some evidence that the accused is engaged in employment, section 26(1)(b) of the Act operates so as to strip the accused of his status as a visitor. Therefore, there is a *prima facie* case against the accused under section 95(k).

## **Removal After Admission**

**REPORTS ON PERMANENT RESIDENTS** — *Reports on visitors and other persons* — *New authorization* — *referral of report* — *Reports relating to persons who constitute a danger to the security of Canada* — *Departure order* — *Duty to provide information* — *Inquiry*.

27. (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who

(a) is a member of an inadmissible class described in paragraph 19(1)(c.2), (d), (e), (f), (g), (k) or (l);  
(a.1) outside Canada,

(i) has been convicted of an offence that, if committed in Canada, constitutes an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except a person who has satisfied the Governor in Council that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

(a.2) before being granted landing, was convicted in Canada of

(i) an indictable offence, or

(ii) an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction,

that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years;

(a.3) before being granted landing,

(i) was convicted outside Canada of an offence that, if committed in Canada, would constitute an offence referred to in paragraph (a.2), or

(ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (a.2),

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

(b) if that person was granted landing subject to terms and conditions, has knowingly contravened any of those terms or conditions,

(c) [Repealed 1992, c. 49, s. 16.]

(d) has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(i) more than six months has been imposed, or

(ii) five years or more may be imposed,

(d) has been convicted of an offence under any Act of Parliament, other than an offence designated as a contravention under the Contraventions Act, for which a term of imprisonment of more than six months has been, or

five years or more may be, imposed. [1992, c. 47, s. 78. Not in force at date of publication.]

(e) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person, (f) wilfully fails to support himself or any dependent member of his family in Canada,

(g) is a member of the inadmissible class described in paragraph 19(1)(j) who was granted landing subsequent to the coming into force of that paragraph, or

(h) became a member of the inadmissible class described in paragraph 19(1)(j) subsequent to the coming into force of that paragraph.

(2) An immigration officer or a peace officer shall, unless the person has been arrested pursuant to subsection 103(2), forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or permanent resident, is a person who

(a) is a member of an inadmissible class, other than an inadmissible class described in paragraph 19(1)(h) or 19(2)(c),

(b) has engaged or continued in employment in Canada contrary to this Act or the regulations,

(c) [Repealed 1992, c. 49, s. 16.]

(d) has been convicted of an offence under the *Criminal Code* or of an indictable offence, or of an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, under any Act of Parliament other than the *Criminal Code* or this Act;

(d) has been convicted of

(i) an offence under the *Criminal Code*,

(ii) an indictable offence under any Act of Parliament other than the *Criminal Code* or this Act, or

(iii) an offence, other than an offence designated as a contravention under the *Contravention Act*, for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction under any Act of Parliament other than the *Criminal Code* or this Act; [1992, c. 47, s. 78; 1992, c. 49, s. 123. Not in force at date of publication.]

(e) entered Canada as a visitor and remains in Canada after that person has ceased to be a visitor,

(f) came into Canada at any place other than a port of entry and failed to report forthwith to an immigration officer or eluded examination or



inquiry under this Act or escaped from lawful custody or detention under this Act,

(g) came into Canada or remains in Canada with a false or improperly obtained passport, visa or other document pertaining to that person's admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person,

(h) came into Canada contrary to section 55,

(i) ceased to be a Canadian citizen pursuant to subsection 10(1) of the *Citizenship Act* in the circumstances described in subsection 10(2) of that Act,

(j) [Repealed 1992, c. 49, s. 16.]

(k) was authorized pursuant to paragraph 14(2)(b), 23(1)(b) or 32(3)(b) to come into Canada and failed to be present for further examination within such time and at such place as was directed, or

(l) wilfully fails to support any dependent member of that person's family in Canada.

(2.1) Subject to any order or direction of the Minister, the Deputy Minister may, on receiving a report pursuant to subsection (2) indicating that a person who was granted entry as a visitor has ceased to be a visitor by reason of any of paragraphs 26(1)(a) to (c) and remains in Canada, authorize the person to remain in Canada as a visitor, on such terms and conditions, and for such period, as the Deputy Minister considers appropriate.

(3) Subject to subsection (3.1) and any order or direction of the Minister, the Deputy Minister, on receiving a report pursuant to subsection (1) or (2), shall, if the Deputy Minister considers it appropriate to do so in the circumstances, forward a copy of that report to a senior immigration officer and may

- (a) where the person is a person described in paragraph (2)(e) by reason of paragraph 26(1)(c) or is a person described in any of paragraphs (2)(f), (h) and (k) and the report does not allege that the person is a person described in any other paragraph of subsection (2), direct that a determination be made with respect to any or all of the allegations mentioned in the report; or
- (b) in any case, direct that an inquiry be held.

(3.1) Where the Deputy Minister receives a report that a person is a person described in paragraph (1)(a) or (2)(a) by reason of being a member of an inadmissible class described in paragraph 19(1)(k), the Deputy Minister shall forward a copy of the report and the direction only if

- (a) in the case of a permanent resident, a certificate has been issued under subsection 40(1) in respect of the person; and
- (b) in the case of a person other than a permanent resident, a certificate

has been signed and filed in respect of the person by the Minister and the Solicitor General of Canada in accordance with subsection 40.1(1) and the Federal Court has not quashed the certificate pursuant to paragraph 40.1(4)(d).

(4) Subject to section 28, where a senior immigration officer receives a report and a direction made pursuant to paragraph (3)(a) in respect of a person, or where a person has been arrested pursuant to subsection 103(2), the senior immigration officer shall

(a) allow the person to remain in Canada if it would not be contrary to this Act or the regulations to allow the person to remain in Canada; or

(b) make a departure order against the person if the senior immigration officer is satisfied that

(i) the person is a person described in paragraph (2)(e) by reason of paragraph 26(1)(c) or is a person described in any of paragraphs (2)(f), (h) and (k), and

(ii) the person is not a person described in any other paragraph of subsection (2).

(5) Every person referred to in subsection (4) shall truthfully provide such information as may be required by the senior immigration officer for the purpose of establishing whether the person is to be allowed to remain in Canada.

(6) Where a senior immigration officer

(a) believes on reasonable grounds that the person referred to in a direction made pursuant to paragraph (3)(a) is a person described in any paragraph of subsection (2), other than a person described in paragraph (2)(e) by reason of paragraph 26(1)(c) or a person described in any of paragraphs (2)(f), (h) and (k), or

(b) receives a direction made pursuant to paragraph (3)(b) that an inquiry be held,

the senior immigration officer shall cause an inquiry to be held concerning the person as soon as is reasonably practicable. 1976-77, c. 52, s. 27; R.S.C. 1985 (3d Supp.), c. 30, s. 4; 1992, c. 47, s. 78; 1992, c. 49, s. 16.

### *Subsection (1)*

### *Paragraph (a.1)*

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

It is not a pre-condition to the operation of section 19(1)(c) that the Governor-in-Council shall have considered the question of rehabilitation and be dissatisfied that the person concerned has brought himself within the exception. The report mandated by

section 27(1) requires the authorizing immigration officer to possess information that the person concerned has been convicted of the kind of criminal act specified in section 19(1)(c) and to have knowledge that the person concerned has not satisfied the Governor-in-Council as to his rehabilitation.

The policy directives, whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public. The procedural formalities which are required in respect of an immigration officer when initiating a section 27(1) report are minimal, first, because this is a purely administrative decision, and second, because the officer when issuing the section 27(1) report is merely the initiator of the inquiry process. An immigration officer before issuing a section 27(1) report is, therefore, not required to give the person concerned an opportunity to answer allegations contained in that report. On the facts, the immigration officer who issued the section 27(1) report had sufficient knowledge and information upon which to base the report; further, the applicant was given full particulars of the allegations against him.

The Court of Appeal adopted the motion's judge's findings, that there was nothing irregular in the fact that the high profile nature of the case, placed pressure on the respondent's representatives to proceed with dispatch.

The requirement of institutional independence is included in the rules of natural justice as well as enshrined in the Charter.

The test for institutional independence is whether a reasonable and right-minded individual, having informed himself of the scheme whereby adjudicators are appointed under the Immigration Act and of the basis upon which they perform their duties, would be likely to conclude that an adjudicator appointed under and acting pursuant to that scheme, more likely than not, would decide fairly the inquiries under the Immigration Act over which he presided. While the case-presenting officers and adjudicators are both civil servants under the direction of the same Minister, they operate in separate and distinct divisions of the Commission. Case-presenting officers have no supervisory role, vis-à-vis adjudicators. They do not report to a common superior and it is only at the apex of the organization chart that their respective hierarchies merge. As far as legal direction is concerned, adjudicators can and do seek advice on difficult legal issues from lawyers on the staff of the Adjudication Directorate, who have no connection or association with the Enforcement Branch. On the subject of monitoring, there is evidence that monitoring practice focuses primarily on how hearings are conducted; with respect to security of tenure, adjudicators, like other civil servants, have the protection afforded pursuant to section 31 of the Public Service Employment Act. Additionally, they have the protection of a three stage grievance procedure. The fact that adjudicators are members of the same bargaining unit as case-presenting officers is a neutral circumstance which does not give rise to any apprehension one way or the other. The practice of appointing adjudicators to other positions on an acting basis does not give rise to reasonable apprehension of a lack of independence. The Court relied on the uncontradicted evidence of an adjudicator to the effect that the decisions made by him were made independently and without direction from anyone else.

Finally, it was pointed out that the assignment of cases is rationally based; complex cases are usually assigned to the more experienced adjudicators. There was nothing to suggest that particular cases were assigned to particular adjudicators, let alone any evidence to suggest that the adjudicator chosen to conduct this inquiry was chosen on



any basis other than the rational basis referred to previously. The Court concluded for these reasons that reasonable persons, reasonably informed, would view adjudicators appointed under the Immigration Act as being independent, keeping in mind the fact that they are for the most part laypersons in the hierarchy of quasi-judicial tribunals; and bearing in mind that their decisions are subject to judicial review by the Court; and that they have all taken an oath of office to “faithfully and honestly fulfill their duties” evolving upon them. Accordingly, the appellant’s appeal was dismissed.

*Editor’s Note:* Section 19(1)(c) has been amended, but the remarks dealing with rehabilitation may be important under subsections 27(1)(a.1) and (a.3).

*Singleton v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

The Court noted that a certificate of the applicant’s conviction would be the best evidence of such conviction and that the lack of such a certificate leaves something to be desired in the particularity of the evidence. Where, however, the evidence as a whole is sufficient to support the finding of the adjudicator that the applicant was a person described in section 27(2)(d) of the Immigration Act, an application to set aside such decision will fail.

*Min. of Employment & Immigration v. Fenner*, Imm. App. Bd., Vancouver, Doc. No. V81-6126, December 11, 1981.

The respondent, Fenner, was convicted in the State of Washington following a guilty plea to the offence of “negligent homicide by means of a motor vehicle”. This offence is equivalent to that set out under section 203 of the Criminal Code. The respondent, Fenner, was given a deferred sentence which meant that at the end of a period of probation he could request the opportunity to withdraw his guilty plea and have the charge dismissed. This, in fact, occurred in this case. The Board decided that this procedure, unknown to Canadian law, was not equivalent to an absolute or conditional discharge and that the conviction in the first instance remained part of Fenner’s record and, therefore, he fell within the provisions of section 19(1)(c). The Board allowed the Minister’s appeal and directed the deportation of Mr. Fenner.

### *Paragraph (a.2)*

*Jares v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. No. 79-6098, June 1, 1981.

The warrant of committal which was filed at the inquiry proceedings was on a preprinted form and headed “Summary Convictions Act — Criminal Code.” The charge for which the appellant had been convicted was trafficking in narcotics, which, pursuant to the Narcotic Control Act, R.S.C. 1970, c. N-1, was an indictable offence carrying life imprisonment as a maximum penalty. The Board stated that the issue was whether the substance of the charges or the heading on the form should govern. It held that the adjudicator was correct in determining that although the warrant of committal upon conviction did not specifically state that the conviction was by way of indictment, that the adjudicator was entitled to consider the provisions of the Narcotic Control Act and come to the conclusion that the appellant was convicted of an indictable offence for which a penalty of 5 years or more may be imposed.

*R. v. Wardley* (1978), 43 C.C.C. (2d) 345 (Ont. C.A.).

Where an accused charged with the indictable offence of possession of marijuana for the purpose of trafficking pleads guilty to the included offence of possession of marijuana, the plea constitutes a plea of guilty to the indictable offence of possession. The maximum sentence for the conviction of the indictable offence of simple possession governs with respect to penalty.

*Re McMahon*, [1978] 2 F.C. 624, 40 C.C.C. (2d) 250, 21 N.R. 170 (Fed. C.A.).

A plea of guilty accepted by a court constitutes a conviction where the person has absconded prior to sentencing.

*Kalicharan v. Min. of Manpower & Immigration*, [1976] 2 F.C. 123, 67 D.L.R. (3d) 555 (Fed. T.D.).

The granting of a conditional discharge by the Court of Appeal means that a conviction is deemed never to have been registered. Therefore, the basis for making a deportation under this subsection is deemed not to have existed at all. Accordingly, prohibition will be granted against the execution of a deportation order.

*Douglas v. Min. of Manpower & Immigration*, [1972] F.C. 1050 (Fed. C.A.).

Where the Minister is proceeding in respect of a conviction for an offence that is under appeal, prohibition will not issue to stop the inquiry. The proper procedure is to put the accused before the officer conducting the inquiry and if necessary proceed by way of appeal from his decision.

### **Paragraph (a.3)**

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.1), supra*.

*Singleton v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

For digest, see section 27, subheading *Subsection (1), Paragraph (a.1), supra*.

*Min. of Employment & Immigration v. Fenner*, Imm. App. Bd., Vancouver, Doc. No. V81-6126, December 11, 1981.

For digest, see section 27, subheading *Subsection (1), Paragraph (a.1), supra*.

### **Paragraph (b)**

*Gabriel v. Min. of Employment & Immigration* (1984), 60 N.R. 108 (Fed. C.A.).

The appellant was landed on condition that she marry within ninety days. This condition could not be obeyed as a result of circumstances beyond the appellant's control. Even though a condition is impossible to fulfil, so long as the person concerned knew of that condition and continued to remain in Canada in breach of that condition, such a person has knowingly contravened a condition attached to the grant of landing. Even if the word "contravene" requires a positive act, the omission to do something which

a person is required to do, is the commission of a positive act. It is an act of failure to do something required to be done and, accordingly, satisfies the definition of the term "contravenes".

*Buguing v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T81-9601, January 11, 1982.

The Board in this case declined to accept the common law relationship as compliance with a term and condition of the granting of landed immigrant status that required the landed immigrant to marry within 90 days of her arrival in Canada.

*De la Cruz v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T-79-9373, August 12, 1980.

Section 27(1)(b) requires that the permanent resident have simply knowledge of the contravention of the terms and conditions imposed upon him as a condition of landing. It does not require *mens rea* or wilful non-compliance with the conditions by the permanent resident.

#### **Paragraph (d)**

*Nguyen v. Canada (Min. of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 165, 100 D.L.R. (4th) 151, 151 N.R. 69, 14 C.R.R. (2d) 146 (Fed. C.A.).

The applicant, who was a permanent resident, was seeking to quash a deportation order. The applicant had been found described in subparagraphs 27(1)(d)(i) and 27(1)(d)(ii). Further, when the applicant attempted to obtain refugee status, a representative of the Minister tendered into evidence a certificate signed by the Minister stating that the applicant constituted a danger to the public of Canada with the result that, under the legislation then in effect, the applicant was not able to claim refugee status. Legislation which purports to define conditions for eligibility to claim refugee status may violate the Charter only if those conditions have the effect of subjecting a group of claimants to discriminatory treatment within the meaning of section 15. To deny dangerous criminals the right, generally conceded to immigrants who flee persecution, is not a form of illegitimate discrimination.

The Minister does not need to be compelled to follow formal guidelines stating the factors that should be taken into account in forming his opinion. The Minister's opinion in respect of public danger is as reliable as that of a court.

Counsel challenged the scheme set up by the Minister for the issuance of a certificate and complained that it did not provide for an oral hearing nor did it contain any provision for judicial review. Those submissions did not have to be addressed. The Court was sitting in judicial review of the decision of a tribunal which did not have jurisdiction to examine whether the public danger certificate has been issued in accordance with the rules of natural justice. The mandate of the tribunal did not entitle it to look behind the certificate fully valid on its face. The decision to issue a certificate is subject to judicial review by the Court only and not by immigration officers. The Court observed that the procedure set up and followed, in this case, accorded the applicant a full opportunity to make his case.

The scheme of the Act, established by subparagraph 27(1)(d)(i), subsection 32(2)



and subparagraph 46.01(1)(e)(ii), is constitutionally sound and the decisions made against the applicant did not infringe his rights guaranteed under the Charter.

*Chiarelli v. Canada (Min. of Employment & Immigration)*, 16 Imm. L.R. (2d) 1, [1992] 1 S.C.R. 711.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of 5 years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in section 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to SIRC. The report indicated that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of SIRC and directed the appellant Minister to issue a certificate under section 82(1) with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

SIRC conducted its investigation and hearing first by reading a document entitled "Statement of Circumstances" as well as two summaries of information. The first day's hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition

imposed by sections 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident's right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the Appeal Board's decision or substitute his decision as he deemed just and proper. The 1966 *White Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision as to whether to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the

principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

*Canepa v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 270, 93 D.L.R. (4th) 589, 10 C.R.R. (2d) 348 (C.A.).

The appellant was born in Italy in 1962 and came to Canada as a permanent resident with his family at the age of 5. He became a drug addict and to support his addiction turned to a life of crime. Between 1978 and 1987 he was convicted of 37 offences. Eventually a report was issued pursuant to section 27(1)(d) and the adjudicator at the ensuing inquiry made a deportation order. This deportation order is in effect reversible on equitable grounds pursuant to section 70. When the scheme of the Act is looked at in total, on appeal, the tribunal must take into account all of the circumstances of the case which include the person in his total context and the good of society as well as that of the individual.

Section 70(1)(b) requires that every extenuating circumstance that can be adduced in favour of the deportee be considered by the Board on appeal.

This treatment of the appellant as mandated by sections 27 and 70 is not cruel and unusual treatment so as to contravene section 12 of the Charter.

*Hurd v. Canada (Min. of Employment & Immigration)* (1988), 90 N.R. 31 (Fed. C.A.).

The appellant was a permanent resident of Canada who was granted landing in November 1968, when he was 19 years of age. The appellant had a number of criminal convictions between 1971 and 1983 and, ultimately, an inquiry was held pursuant to a report issued under section 27(1)(d)(i). The appellant argued that section 11(h) of the Charter was infringed because deportation was, in effect, a double punishment, being imposed upon him for the crimes that he had committed and for which he had been sentenced. It was held that a deportation proceeding is not within section 11(h) of the Charter. The necessary redressing of the wrong done to society by criminal conduct and the goal of deterrence of others had been accomplished through the criminal convictions. The purpose of deportation is not any larger social purpose; it is merely to remove from Canada an undesirable person. Deportation to a deportee's country of birth is not a true penal consequence. It is analogous to the loss of a licence or to dismissal from a police force or to the forfeiture of a right to practise a profession. Accordingly, the appellant's appeal was dismissed.



*Jares v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. No. 79-6098, June 1, 1981.

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

*Re Anderson and Min. of Employment & Immigration*, [1981] 2 F.C. 30, 113 D.L.R. (3d) 243, 36 N.R. 423 (Fed. C.A.).

An immigration officer forwarded a written report to the Deputy Minister setting out information which suggested that the applicant was a person described in section 19(1)(c) of the Immigration Act. The adjudicator issued a departure notice after an inquiry in which he determined on the evidence that the applicant was not a person described in section 19(1)(c) of the Immigration Act, but was a person described in section 19(2)(a) of the Act. The departure notice was set aside. The Court held that the adjudicator could only make the appropriate order where he found the actual grounds set out in the report to be established.

*Re McMahon*, [1978] 2 F.C. 624, 40 C.C.C. (2d) 250, 21 N.R. 170 (Fed. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

*R. v. Wardley* (1978), 43 C.C.C. (2d) 345 (Ont. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

*Kalicharan v. Min. of Manpower & Immigration*, [1976] 2 F.C. 123, 67 D.L.R. (3d) 555 (Fed. T.D.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

*Douglas v. Min. of Manpower & Immigration*, [1972] F.C. 1050 (Fed. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

### **Paragraph (e)**

*Medel v. Canada (Min. of Employment & Immigration)*, 10 Imm. L.R. (2d) 274, [1990] 2 F.C. 345, 113 N.R. 1 (C.A.).

The appellant entered Canada as a visitor and, while in Canada, met and married a Canadian citizen. The appellant returned to Honduras and her husband sponsored her as his wife. After a visa was issued to the appellant, the husband then withdrew his sponsorship and began living with another woman. The Canadian Embassy in Guatemala attempted to retrieve the permanent visa which had been issued to the appellant suggesting to her that there was an error in the visa and that it should be returned to the Embassy. The appellant, through an English speaking uncle, reviewed the visa and could not find any error. The appellant entered Canada as a permanent resident, discovered the fact that her husband had withdrawn his sponsorship and was now, in fact, living with another woman and was later the subject of an inquiry under section 27(1)(e).

An adjudicator determined that the appellant was not described in section 27(1)(e). The Minister appealed and the Board allowed the appeal and issued something called a "Suspended Deportation Order". The nondisclosure was the fact that the appellant did not volunteer to the admitting officer the information that the Embassy in Guatemala had requested the return of her visa and that she did not produce for scrutiny the Embassy's

telegram to her requesting the return of the visa. It was found as a fact that the appellant was subjectively unaware that she was holding anything back as she had no knowledge of her husband's withdrawal of the sponsorship and her impression was that the Embassy was being excessively bureaucratic. The Court distinguished *Brooks* on the basis that in that case the claimant concealed information about a conviction for bigamy and about criminal charges and deportation proceedings and *Gudino* where the claimant had been telephoned by the Embassy and told that his visa was no longer valid and that he should not attempt to enter Canada. Accordingly, the appeal was allowed, the decision of the Immigration Appeal Board was set aside, and the matter was returned to the Board for reconsideration on the basis that the appellant was not granted landing by reason of any fraudulent or improper means.

*Anthony v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T-84-9706, December 16, 1985.

The appellant, a citizen of Jamaica, was granted landing at Toronto International Airport on August 8, 1981, in order to marry her sponsor, Frank Anthony. The application for permanent residence, completed on January 27, 1981, was false in that the appellant listed only 2 of her 4 children and wrote, in her own handwriting, "I have no other children". The appellant's misrepresentations diverted the visa officer from carrying out his duties under the Act and Regulations, which required that he determine whether *all* the appellant's dependants met the requirements of the Act and Regulations before he could issue an immigrant visa to her. The Board dismissed the appellant's appeal, ruling that a deportation order, made under section 27(1)(e) of the Act, was valid.

*D'Souza v. Min. of Employment & Immigration*, [1983] 1 F.C. 343 (Fed. C.A.).

This was an appeal under section 84 of the Immigration Act from a decision of the Immigration Appeal Board dismissing the appellant's appeal from a deportation order. The ground for deportation was that the appellant was a person who had been granted landing by reason of a misrepresentation of a material fact made by another person, his mother. The appellant made an application of his own on which there were no misrepresentations. The appellant was, however, granted entry as a dependant of his mother. The Court held that the person concerned, to be described in section 27(1)(e), need not have knowledge of the material misrepresentation made on his behalf. The Court also noted that the Board, in determining whether to grant special relief, cannot be required to state every feature given consideration by it, and it was not to be presumed from the failure to mention a feature of the situation that the feature had not been considered and taken into account.

*Gudino v. Min. of Employment & Immigration*, [1982] 2 F.C. 40, 124 D.L.R. (3d) 748, 38 N.R. 361 (Fed. C.A.).

The applicant obtained a visa permitting him to enter Canada as a permanent resident. This visa was based in part on an offer of employment with Aero Mexico, an airline with offices in Toronto. The applicant lost his employment with Aero Mexico. He was then advised by telephone by a visa officer in Mexico that his visa was no longer valid and that he should not proceed to Canada. The applicant, however, flew to Toronto from Mexico in spite of being so informed. The Court held that a permanent resident visa issued under the Immigration Act, R.S.C. 1970, could be revoked by reason of a change in circumstances and found that a change in circumstances had occurred in this

case. The change in circumstances was material and should have been disclosed to the immigration officer at the port of entry. The Court held that the method of communicating the revocation of the visa (*i.e.*, by telephone) was the most appropriate and effective method in the circumstances.

*Khamsei v. Min. of Employment & Immigration*, [1981] 1 F.C. 222 (Fed. C.A.).

Whether a misrepresentation was of a material fact is a question of fact. There does not need to be direct evidence that a visa would not have been granted had there been no misrepresentation. Where the failure to disclose all previous visa applications averts further inquiries, it is open to the adjudicator to find that there was a misrepresentation of a material fact.

*Min. of Employment & Immigration v. Mercier*, Imm. App. Bd., Montreal, Doc. No. 79-1243, September 16, 1980.

A visa is no more than a stamp on a piece of paper issued outside Canada which may give the holder a colour of right to come into Canada, either as a visitor or an immigrant, as the case may be, but no more. Immigration status is acquired at the port of entry. The Board held that a change in marital status from single to married was a material fact which must be disclosed to the Canadian immigration authorities if it occurs before permanent resident status is actually granted. By failing to disclose her marriage at Dorval airport when she arrived in Canada, Mme. Mercier misrepresented a material fact and thus brought herself within section 27(1)(e).

*Devrim v. Min. of Employment & Immigration*, Imm. App. Bd., Calgary, Doc. No. 78-6192, April 24, 1979.

The appellant acted in good faith in dealing with the immigration authorities. During her initial interview at Ankara, she stated that she was engaged, which the Board found she honestly believed herself to be. At her second visit to the Canadian Embassy there, she disclosed the fact of her marriage and received some misleading information. At the airport in Toronto she was not examined in her native language and had no idea what was shown on her immigrant record card.

The Board held that section 27(1)(e) of the Act imposed an obligation of absolute liability and, thus, the defence of due diligence was not available. Under section 72(1)(b) of the Act the Board allowed the appeal, finding as it did that the appellant acted in good faith and finding that she was seriously misled by information given to her at her second attendance at the embassy in Ankara and that she was disadvantaged by the absence of a Turkish interpreter at the airport on her arrival.

*Moore v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. 78-3016, December 6, 1978.

Mrs. Moore misrepresented herself as single in her application for permanent residence and on her immigrant record card. She signed her maiden name to both these documents. The Board held that this was a misrepresentation of a material fact within the meaning of this subsection and accepted the proposition that *mens rea* would not be an element of this subsection, at least insofar as the disclosure of the existence of dependants was concerned and, thus, held that it was no excuse for the appellant to say that the question as to the existence of dependants was never directly asked by an immigration officer.



*Min. of Manpower & Immigration v. Brooks*, [1974] S.C.R. 850, 36 D.L.R. (3d) 522 (S.C.C.).

The determination of whether a document pertains to a person's admission into Canada is not a question of fact: it follows automatically from and depends upon a prior construction of the scope of the relevant words of the section under consideration.

*Min. of Manpower & Immigration v. Brooks*, *supra*.

The phrase "by reason of" imports something beyond merely giving false or misleading information. It connotes an inducing influence of the information and thus brings into question the notion of materiality. Inadvertence or carelessness in an answer must be weighed as to its consequences in this context.

*Min. of Manpower & Immigration v. Brooks*, *supra*.

The phrase "fraudulent or improper means" is broad enough to embrace non-disclosure of facts which, if known, would be material to admission or non-admission.

## Subsection (2)

### Paragraph (a)

*Cortez v. Canada (Secretary of State)* (1994), 74 F.T.R. 9.

The applicant came to Canada in 1987. The record does not indicate his status, but he was not a Canadian citizen or a permanent resident at the time of this case. The applicant was convicted of impaired driving on September 19, 1989. Two other convictions followed on October 23, 1989 and March 16, 1990. The latter convictions related to having a blood alcohol level higher than .08. A report was made on November 5, 1990. This report provided that the applicant was described in section 27(2)(a) in that he was inadmissible by virtue of section 19(2)(b)(i). On December 1, 1992 an inquiry was held and the adjudicator, relying on *Ruparel v. Canada (Min. of Employment & Immigration)*, 3 F.C. 615, (1990), 11 Imm. L.R. (2d) 190, 36 F.T.R. 140, concluded that the allegation that the applicant was inadmissible was not valid.

On February 1, 1993 section 19(2) was amended. On March 2, 1993 a new report was issued in respect of the applicant relying on the same convictions. An inquiry was held in May, 1993 and a deportation order issued.

There was no question of retrospectivity. A determination had to be made at the time of the second inquiry of the applicant's admissibility and that determination had to be made on the facts and the provisions of the Act, namely sections 27(2)(a) and 19(2)(a), as they read after the 1993 amendments.

Section 34 excludes *res judicata* in the specific context of section 27 and therefore the adjudicator had jurisdiction to examine the applicant's admissibility to Canada.

There was no unreasonable delay. The report in question (March 19, 1993) was written approximately one month after the amendments to the Act and the inquiry was held two months later. There was, therefore, no unreasonable delay.

*R. v. Parker*, Man. Q.B., Doc. No. 85-01-00584, July 12, 1985.

An inquiry concerning Mr. Parker was held upon two reports under section 27. At the conclusion of the inquiry, the adjudicator found in Mr. Parker's favour with respect to the allegation under section 27(2)(a) and in favour of the Commission with respect

to the allegation under section 27(2)(b). A departure notice was issued to Mr. Parker. The Commission was unhappy with the result, as it had been seeking a deportation order. No appeal of the adjudicator's decision was made; instead, fresh proceedings under section 27(2)(a) were commenced. Mr. Parker was arrested and detained in connection with these new proceedings. The warrant for arrest and the order of detention were quashed and it was determined that the applicant was not properly detained. The Commission, at the time of the first inquiry, was aware of the fact that the applicant had an extensive criminal record. The Commission made a calculated decision to proceed with the information that it could prove and did not seek an adjournment to obtain the information that was the subject of the second inquiry. Thus, the issue to be dealt with on the second inquiry was held to have been already decided as a result of the first inquiry and there was, therefore, no jurisdictional basis for the second inquiry.

*Brenner v. Min. of Employment & Immigration*, [1983] 1 F.C. 172 (Fed. T.D.).

The adjudicator determined that the applicant was a person described in section 27(2)(a), because the applicant was inadmissible as a member of a class described in section 19(2)(a)(ii). The applicant applied to the adjudicator for a grant of entry under section 19(3). The adjudicator decided that she had no jurisdiction to entertain the application. A writ of *mandamus* compelling the adjudicator to consider the application under section 19(3) was refused on the ground that her decision brought the person within section 32(6) and, therefore, the adjudicator had no discretion to grant entry to such a person under section 19(3).

*Editor's Note:* Section 19(2)(a) has been amended, but the principle may still be valid.

### **Paragraph (b)**

*Grewal v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-836-84, October 1, 1984.

An inquiry was held to determine whether the applicant was a person who had entered Canada as a visitor and remained in Canada after ceasing to be a visitor. The Court concluded that once a person has been made the subject of an inquiry to determine his right to stay in Canada, the mere fact that after the start of the inquiry he leaves the country for a time does not deprive the adjudicator of his jurisdiction to continue and complete the inquiry.

*Kaur v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-295-84, September 6, 1984.

The applicant sought admission to Canada as an immigrant. Following a report made pursuant to section 20(1) of the Immigration Act, she was made the subject of an inquiry. That inquiry was adjourned after the applicant claimed to be a Convention refugee. During the adjournment the applicant left the country for the United States, was refused permission to enter that country and immediately came back to Canada where she reapplied to be admitted as an immigrant. The inquiry, which had been adjourned, culminated in an exclusion order. The adjudicator who presided over the inquiry did not lose jurisdiction when the applicant left Canada for the United States. Once a person seeking admission to Canada has been made the subject of an inquiry in order to determine her admissibility, the mere fact that she, after the start of the inquiry, either

left Canada or manifested an intention no longer to seek admission, does not deprive the adjudicator of his jurisdiction to continue the inquiry.

*Miles v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1121-83, February 13, 1984.

The Court upheld the decision of an adjudicator finding that the applicant had engaged in employment without authorization and that thereafter the applicant was in breach of one of the conditions of her entry to Canada as a visitor. The Court upheld the adjudicator's finding that the applicant was, therefore, a person described in section 27(2)(e) of the Immigration Act and subject to an inquiry.

*R. v. Malhotra (No. 1)*, [1981] 2 W.W.R. 563, 57 C.C.C. (2d) 539 (Man. Prov. Ct.).

Where there is some evidence that the accused is engaged in employment, section 26(1)(b) of the Act operates so as to strip the accused of his status as a visitor. Therefore, there is a *prima facie* case against the accused under section 95(k).

*Georgas v. Min. of Employment & Immigration*, [1979] 1 F.C. 349, 23 N.R. 437 (Fed. C.A.).

On the facts of this case, there was evidence from which an adjudicator could conclude that the applicant had engaged in employment. However, not all work performed by a visitor for a relative with whom he or she is staying, and for which the relative would have to pay compensation if he or she chose to have it done by a stranger, falls within the definition of employment. Whether the work done is employment depends upon the nature of the work and the circumstances.

### **Paragraph (d)**

*Estrada v. R.* (1987), 1 Imm. L.R. (2d) 24, 8 F.T.R. 317 (Fed. T.D.).

The applicant was the subject of an immigration inquiry. The inquiry was based on a defective report because the report alleged that the applicant had been convicted of an offence under section 3(1) of the Narcotic Control Act without making it clear that the allegation related to the conviction for an indictable offence under another Act of Parliament and not the Criminal Code. The report was amended. However, during the course of argument, the adjudicator and the case presenting officer became concerned about the validity of the proceedings. The case presenting officer received instructions from her superiors to withdraw the direction. The adjudicator indicated that the procedure being followed was correct and that no withdrawal of the direction was necessary. The case presenting officer requested an adjournment to consider her position, and her request was denied, whereupon she withdrew the direction. A new direction for inquiry was forthcoming. The report alleged that the applicant was convicted of one count of possession of a narcotic contrary to the Narcotic Control Act. This was held not to be an abuse of process. The Court characterized the Minister as having acted in a very cautious way in order to avoid any error of law. The Court found nothing so oppressive or vexatious as to constitute an abuse of process. The fact of the withdrawal of the direction in order to terminate the inquiry, coupled with the allowing of another direction



for inquiry to be made and based upon the same facts, although under a different paragraph of section 27, did not, in the circumstances, constitute an abuse of process.

*Singleton v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-813-83, November 7, 1983.

For digest, see section 27, subheading *Subsection (1), Paragraph (a.1), supra*.

*Re McMahon*, [1978] 2 F.C. 624, 40 C.C.C. (2d) 250, 21 N.R. 170 (Fed. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

*Kalicharan v. Min. of Manpower & Immigration*, [1976] 2 F.C. 123, 67 D.L.R. (3d) 555 (Fed. T.D.).

For digest, see section 27, subheading *Subsection (1), Paragraph (a.2), supra*.

### **Paragraph (e)**

*Grewal v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-836-84, October 1, 1984.

For digest, see section 27, subheading *Subsection (2), Paragraph (b), supra*.

*Min. of Employment & Immigration v. Tighe*, Imm. App. Bd., Montreal, Doc. No. M83-1128E, February 17, 1984.

The Minister appealed under section 73 of the Immigration Act. The adjudicator had decided that the respondent was not a person described in section 27(2)(e) of the Act. As a result of this finding the adjudicator did not make a removal order against the respondent or issue a departure notice to him. The respondent had claimed to be a Canadian citizen at the inquiry. This claim was not disposed of due to the adjudicator's decision that the respondent was not described in section 27(2)(e) of the Act. The Board ruled that it did not have the power to allow the Minister's appeal pursuant to section 75(2) of the Act because it could not make a removal order against the respondent. The removal order could not be made because the respondent's claim to Canadian citizenship had never been resolved in accordance with the provisions of the Act. Accordingly, the Minister's appeal was dismissed.

*Miles v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1121-83, February 13, 1984.

For digest, see section 27, subheading *Subsection (2), Paragraph (b), supra*.

*Min. of Employment & Immigration v. Swapp*, Imm. App. Bd., Vancouver, Doc. No. T83-9093, December 16, 1983.

The adjudicator refused to find the respondent a person described in section 27(2)(e) of the Immigration Act because the respondent was unable to extend his visa or leave the country by virtue of the fact that he was in jail from the time of his arrival until several days after the expiry of his visa. The Minister's appeal was allowed. The Board ruled that it was not reasonable that the respondent should benefit from his criminal activity by receiving more favourable treatment from immigration laws than he was otherwise entitled to.

*Min. of Employment & Immigration v. Cembranos-Alvarez*, Imm. App. Bd., Calgary, Doc. No. V81-6106, December 11, 1981, affirmed Fed. C.A., Doc. No. A-267-82, June 6, 1983.

The respondent entered Canada as a visitor and overstayed, failing to leave Canada by September 25, 1978. A Minister's permit was issued on February 20, 1979. This permit was cancelled. The Board held that the issuance of the Minister's permit did not take away the very essence of the violation alleged against the respondent (*i.e.*, that he overstayed). The issuance of the permit temporarily suspended the opportunity to make the section 27 report until the permit had either run its course or been cancelled. The Board held that the adjudicator erred in failing to direct the deportation of the respondent and allowed the Minister's appeal and directed the respondent's deportation.

*R. v. Malhotra (No. 1)*, [1981] 2 W.W.R. 563, 57 C.C.C. (2d) 539 (Man. Prov. Ct.).

For digest, see section 27, subheading *Subsection (2), Paragraph (b), supra*.

*Heras v. Min. of Employment & Immigration*, [1981] 2 F.C. 605 (Fed. T.D.), affirmed [1983] 1 F.C. 347 (Fed. C.A.).

When a Minister's permit is issued to a person who has overstayed his visit in Canada, such person may, upon the expiration or cancellation of the permit, be dealt with under this paragraph as a visitor who remained in Canada after he ceased to be a visitor.

### **Paragraph (f)**

*Rios v. Canada (Min. of Employment & Immigration)*, 11 Imm. L.R. (2d) 132, 115 N.R. 394, [1990] 3 F.C. 632.

This case raises the question of what is meant by the word "elude" in section 27(2)(f) of the Immigration Act. The majority concluded that the word "elude" has the connotation either of artifice or surreptitiousness or of the intention to repudiate the obligation or escape the effect of the law in a general way. In the context of this case it would mean, not only not being present at a particular inquiry, but also of not complying with the obligation of the law. Failure to attend at an examination raises a *prima facie* case under section 27(2)(f) such that an immigration officer could believe that the person in question eluded examination or inquiry and appropriate enforcement action taken. The person concerned would be able, however, to have his or her case subsequently adjudicated upon in relation to his or her real intentions and this did not happen in this case. This will not render administration of the Act difficult. Accordingly the majority ruled that the section 28 application to set aside the deportation order issued against the applicant should succeed. The minority agreed that a person does not elude an inquiry within the meaning of section 27(2)(f) if that person has reasonable grounds for believing that he has good cause for not appearing at the inquiry.

### **Paragraph (g)**

*Canada (A.G.) v. Chanoine* (1987), 4 Imm. L.R. (2d) 136, 15 F.T.R. 143 (Fed. T.D.).

The Attorney General applied for a Writ of *Certiorari* and a Writ of *Mandamus*

setting aside the decision of an adjudicator not to hold an inquiry concerning the respondent and ordering the adjudicator to proceed with the inquiry.

The respondent was given the status of a permanent resident and subsequently left Canada for a period of three years. Just before returning to Canada, the respondent unsuccessfully applied for a visitor's visa. The respondent entered Canada and made no disclosures of any kind to the officer at the port of entry. A report was prepared indicating that the respondent was a person described in section 27(2)(b) and 27(2)(g) of the *Immigration Act*. The adjudicator declined jurisdiction adopting the argument that the respondent should have been proceeded with under section 27(1), which applied to permanent residents.

This decision of the adjudicator was set aside and the adjudicator was directed to continue the inquiry.

A permanent resident has been defined as a person who has been granted landing and who has not ceased to be a permanent resident pursuant to section 24(1). Accordingly, the respondent automatically lost his permanent resident status, pursuant to section 24(1), by reason of his having been outside of Canada for more than 183 days, unless he satisfied the adjudicator that he had not done so.

*Editor's Note:* This case should be read with *Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273, 110 D.L.R. (3d) 126 (Fed. C.A.).

*Coombs v. Min. of Employment & Immigration*, [1982] 1 F.C. 113 (Fed. C.A.).

The Court held that the question, "are you a 'resident' of Canada?," did not necessarily mean, "permanent resident" of Canada. There was, therefore, no basis for the adjudicator to assume that the expression "permanent resident of Canada" was the same as "resident of Canada".

*Gudino v. Min. of Employment & Immigration*, [1982] 2 F.C. 40, 124 D.L.R. (3d) 748, 38 N.R. 361 (Fed. C.A.).

For digest, see section 27, subheading *Subsection (1), Paragraph (e), supra*.

*Khamsei v. Min. of Employment & Immigration*, [1981] 1 F.C. 222 (Fed. C.A.).

Whether a misrepresentation was of a material fact is a question of fact. There does not need to be direct evidence that a visa would not have been granted had there been no misrepresentation. Where the failure to disclose all previous visa applications prevents further inquiries, it is open to the adjudicator to find that there was a misrepresentation of a material fact.

*Min. of Manpower & Immigration v. Brooks*, [1974] S.C.R. 850, 36 D.L.R. (3d) 522 (S.C.C.).

"With" in the context of a similar paragraph in the Immigration Act, R.S.C. 1970 (section 18(1)(e)(viii)), is not limited in meaning to possessed of, but contextually extends to "agreeably to" or "because of" or "by use of".

*Min. of Manpower & Immigration v. Brooks, supra*.

The determination of whether a document was one pertaining to a person's admission to Canada was held not to be a question of fact, as it followed automatically from, and



depended upon, a prior construction of the scope of the relevant words of a similar paragraph under the Immigration Act, R.S.C. 1970.

*Min. of Manpower & Immigration v. Brooks, supra.*

The phrase "fraudulent or improper means" is broad enough to embrace non-disclosure of facts which would be material to admission or non-admission if known.

*Min. of Manpower & Immigration v. Brooks, supra.*

Under section 18(1)(e)(viii) of the old Act, which bears some similarity to this subsection, intentional or wilful deception is not implied by the word false, and thus an honest belief that a document was valid is not relevant.

### **Paragraph (h)**

*Vega v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-261-82, February 15, 1983.

The applicant had left and re-entered Canada after having been ordered deported. The adjudicator erred in ruling that it was the applicant's responsibility to prove that he had obtained the Minister's consent before coming back into the country. That burden clearly lay upon the Commission. This error did not vitiate the adjudicator's decision since he did not rely upon the onus of proof to reach the conclusion that the applicant did not have the Minister's consent. The Court held, as well, that the consent of the Minister must be expressed and could not be implied.

*Vargas-Cataldo v. Min. of Manpower & Immigration*, [1973] F.C. 313 (Fed. C.A.).

The adjudicator has no power to question the validity of a previous deportation order in proceedings under this paragraph.

### **Subsection (3)**

*Asante v. Canada (Min. of Employment & Immigration)* (1993), 64 F.T.R. 10.

The applicant was a citizen of Ghana. She came to Canada on October 12, 1989, having obtained a visitor's visa to Canada. Her visitor's visa was valid for one month and this visa was later extended to January 11, 1990. When the applicant could not go to the United States to study she claimed refugee status, but subsequently had her visitor's visa extended to July 11, 1990. On May 29, 1990 an immigration officer made a report pursuant to paragraph 27(2)(e) of the Immigration Act. A direction for inquiry was issued on July 4, 1990. At the conclusion of the inquiry the adjudicator issued a departure notice to the applicant. Later, a first-level panel concluded that there was no credible basis for the applicant's claim for Convention refugee status.

At the time the section 27 report was made and at the time the direction for inquiry was issued, the applicant was in Canada on a validly subsisting visitor's visa. There was no authority under the Act to make a report or to issue a direction for inquiry. Therefore, the adjudicator had no jurisdiction to proceed with the inquiry and issue a departure notice. Accordingly, the departure notice issued in this case was set aside.

*Blanusa v. Canada (Min. of Employment & Immigration)* (1989), 27 F.T.R. 107 (T.D.).

The applicant argued that, because there were grounds under the Extradition Act and the Extradition Treaty with the United States upon which he might resist extradition under those instruments, proceedings under the Immigration Act to deport him ought to be prohibited. It was contended that to proceed with the deportation hearing would automatically violate section 7 of the Charter because the applicant would not be able to raise in the deportation proceedings objections to his removal which were, by their nature, only available in the extradition proceedings. Extradition and immigration proceedings are separate processes. The applicant was being proceeded against under the Immigration Act because he violated the laws of Canada by staying in this country for over 2 years. He was being proceeded against under the Extradition Act and Treaty because he had allegedly committed kidnappings and murders in the United States. There was no basis for thinking that the deportation hearing was illegal or unconstitutional and accordingly the application was dismissed.

*Kindler v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-648-85, June 3, 1987.

The respondent, Kindler, is an American citizen who was convicted of first degree murder, kidnapping and criminal conspiracy in Pennsylvania, U.S.A. The jury recommended the death sentence, but Kindler escaped before the sentence was formally pronounced. He was discovered by the R.C.M.P. in St. Adele, Quebec and was arrested and charged with offences under the Immigration Act and Criminal Code. Before the date set for his inquiry under the Immigration Act, the Trial Division issued a writ of *certiorari* quashing the direction of the Deputy Minister under section 27(3) of the Act. A writ of prohibition forbidding an inquiry was also issued. The respondent escaped custody in October 1986 and has not been heard from since that time.

Nevertheless, his counsel appeared for him on this appeal. It was noted that while there is a general duty of fairness resting on all public decision-makers, there is a flexible gradation of procedural fairness through the administrative spectrum. The decision of the Deputy Minister under section 27(3) to issue a direction for inquiry, the decision of a senior immigration officer under section 27(4) to cause that inquiry to be held, and the parallel decision of an officer under section 28 to cause an inquiry to be held are purely administrative decisions. A senior immigration officer is merely a conduit through whom the inquiry is caused by operation of the Act. The Deputy Minister has only to decide that an inquiry is warranted, and this he would do on the existence of a *prima facie* case. His decision is analogous to that of any prosecutor who decides to proceed with a charge before the Court. These types of decisions are ones with respect to the respondent, but they cannot be described as decisions against him. These decisions do not deprive the respondent of his life, liberty, or security of the person, or even of his property. Accordingly, the respondent is not entitled to a "paper hearing" in the circumstances with respect to the decision to grant the hearing. Further, the hearing prescribed by the Immigration Act meets the procedural requirements of fundamental justice. The respondent has a full opportunity to present his case on the facts and to challenge those of the other side, all with the aid of counsel. The fact that the penalty is prescribed in no way lessens the fairness of the hearing.

Finally, it was held that the Court should not, in a case such as this, take into account

other possible consequences of deportation, such as the possibility of capital punishment for the respondent.

*Editor's Note:* The sections of the Act referred to have been substantially altered, but the principles may still be useful.

*Russell v. Canada (Min. of Employment & Immigration)* (1986), 21 Admin. L.R. 99, 4 F.T.R. 11 (Fed. T.D.).

This was an application for *certiorari* to quash an inquiry and the order to conduct an inquiry under section 27(4). The acting Director General, Enforcement Branch, on behalf of the Deputy Minister, directed, pursuant to section 27(3), that an inquiry be held to determine if the applicant fell within section 27(1)(d). The inquiry was held and the applicant was ordered deported. The applicant, a landed immigrant, appealed to the Immigration Appeal Board and 2 years later, while his appeal was pending, brought the present application, which was dismissed. The applicant contended that it was unfair that the Deputy Minister or his representatives, should direct an inquiry pursuant to section 27(3) without first affording the applicant at least a hearing in writing on the question of whether an inquiry was warranted. This argument was rejected. Although it was agreed that a duty of fairness was attached to the administrative decision authorized in section 27(3), relief by way of *certiorari* was discretionary and the Court declined to exercise its discretion because the appeal route, open to the applicant under section 72 [s. 70], provided a fully adequate recourse. There was, therefore, no justification for the Court intervening.

*Editor's Note:* The sections of the Act referred to have been substantially altered, but the principles may still be useful.

*Min. of Manpower & Immigration v. Brooks*, [1974] S.C.R. 850, 36 D.L.R. (3d) 522 (S.C.C.).

Duplicity in a direction for inquiry is not a ground for annulling the deportation order made at such inquiry. All that is required is that the subject of the inquiry be made aware of the allegations made against him under the relevant provisions of the Immigration Act and that he is given an opportunity to meet them.

### Conditional Departure Order

**CONDITIONAL DEPARTURE ORDER — When conditional order becomes effective.**

28. (1) Where a senior immigration officer is of the opinion that a person who claims to be a Convention refugee is eligible to have the claim referred to the Refugee Division and is a person in respect of whom the senior immigration officer would, but for this section, have made an exclusion order under subsection 23(4) or a departure order under subsection 27(4), the senior immigration officer shall make a conditional departure order against the person.



(2) No conditional departure order made pursuant to subsection (1) against a person who claims to be a Convention refugee is effective unless and until

- (a) the person withdraws the claim to be a Convention refugee;
- (b) the person is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;
- (c) the person is determined by the Refugee Division not to be a Convention refugee and has been so notified; or
- (d) the person is determined pursuant to subsection 46.07(1.1) or (2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified. 1976-77, c. 52, s. 28; 1992, c. 49, s. 17.

### Conduct of Inquiries

*INQUIRY IS PUBLIC — Confidentiality — Idem — Minors and incompetents — Where representative designated by adjudicator — Resumption.*

29. (1) Subject to subsections (2) and (3), an inquiry by an adjudicator shall be conducted in public, and shall be held in the presence of the person with respect to whom the inquiry is to be held wherever practicable, unless the person consents in writing to the inquiry being conducted without a hearing and in the person's absence.

(2) Where an adjudicator is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of an inquiry being conducted in public, the adjudicator may, on application therefor, take such measures and make such order as the adjudicator considers necessary to ensure the confidentiality of the inquiry.

(3) Where an adjudicator considers it appropriate to do so, the adjudicator may take such measures and make such order as the adjudicator considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (2).

(4) Where an inquiry is held with respect to any person under the age of eighteen years or any person who, in the opinion of the adjudicator presiding at the inquiry, is unable to appreciate the nature of the proceedings, the person may, subject to subsection (5), be represented by a parent or guardian.

(5) Where at an inquiry a person described in subsection (4) is not represented by a parent or guardian or where, in the opinion of the adjudicator presiding at the inquiry, the person is not properly represented by a parent or guardian, the inquiry shall be adjourned and the adjudicator shall designate some other person to represent that person at the expense of the Minister.

(6) Where an inquiry has been adjourned pursuant to this Act or the regulations, the inquiry may be resumed by an adjudicator other than the adjudicator who presided at the adjourned inquiry where

- (a) the person who is the subject of the inquiry consents to the inquiry being resumed by another adjudicator;
- (b) no substantive evidence was presented at the adjourned inquiry; or
- (c) the adjudicator, before adjourning the inquiry, had found that the person who is the subject of the inquiry was a person described in subsection 27(2), and that all that remains to be presented is the substantive evidence that will determine whether a deportation order should be made against the person. 1976-77, c. 52, s. 29; R.S.C. 1985 (1st Supp.), c. 31, s. 99; 1992, c. 49, s. 18.

### *Subsection (1)*

*Altamirano v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 86, 48 F.T.R. 88.

This application for leave was dismissed. The applicant objected to being limited to 45 minutes in oral submissions after the filing of written arguments. This was held to raise no arguable violation of the Immigration Act or a denial of fairness or natural justice. The applicant's counsel had already filed 1400 pages of evidence and the applicant's sole complaint was that his counsel was not permitted to summarize this evidence orally and make oral submissions based on it and on the law. Requiring written submissions and limiting the time for oral submissions was held to be consistent with the practice followed in many Canadian courts, including the Supreme Court of Canada.

*Ragunauth v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1295-85, June 28, 1985.

The applicant was the subject of a deportation order and made this application for an interlocutory injunction to restrain the Minister from carrying out the order. The applicant was ordered deported under an assumed name. Eventually, her true identity was discovered and while in transit out of the country she committed an aggravated assault and was sentenced to 2 years in prison for that offence. On November 30, 1983, the applicant refused to attend at the commencement of her hearing at the Kingston Prison for Women because she wanted to hire a lawyer and was frightened to proceed with the case on her own. The applicant was advised, in writing, by the adjudicator that her voluntary absence from the inquiry would not prevent a decision from being reached and she was advised to attend at the next sitting of her inquiry whether or not counsel was present. On December 22, 1983, the applicant again refused to attend at her inquiry at the Kingston Prison for Women. A few days later the applicant was advised that a deportation order had been made against her. Early in 1984, the applicant was visited by duty counsel and an application was made to the Ontario Legal Aid Plan, and this was refused. In February 1985, the applicant wrote to the adjudicator and requested that the inquiry be reopened in order to permit her to adduce evidence of her claim for refugee status. The adjudicator decided that a claim to being a refugee was neither additional evidence nor testimony in the meaning of section 35(1) of the Act and refused to reopen the inquiry. The Court concluded that the adjudicator was probably wrong in ruling that a claim to being a Convention refugee was neither additional evidence nor testimony. The Court held that the refusal to reopen the inquiry was not

unfair because the applicant had spurned three opportunities to make such a claim. The first opportunity occurred when she was initially arrested and gave a false name. The second occurred when she refused to attend her own inquiry on November 30, 1983, and the third occasion occurred when she refused to attend at her own inquiry in December 1983. Those three refusals, plus the adjudicator's letter to the applicant urging her to attend her inquiry, suggested to the Court that the refusal to reopen the inquiry was not unfair. Further, the Court concluded that there was no deprivation of the right to life, liberty and security under section 7 of the Charter because any deprivation of such rights was the applicant's own doing and was self-inflicted. It could not, therefore, be imputed to the State or its officers or employees.

*Cheung v. Min. of Employment & Immigration* (1981), 122 D.L.R. (3d) 41, 36 N.R. 563 (Fed. C.A.).

An inquiry is not a criminal or civil trial.

*Ali v. Min. of Manpower & Immigration*, [1976] 1 F.C. 185, 11 N.R. 617 (Fed. C.A.).

Whether a person signing on behalf of the Deputy Minister had the authority to do so is a question of fact which in an appropriate case can be proved in the Federal Court. In such a case the burden will be on the applicant. This burden had to be distinguished from the onus of establishing facts sufficient to support the deportation order or departure notice.

#### ***Subsection (4)***

*Azdo v. Min. of Employment & Immigration*, [1980] 2 F.C. 645, 36 N.R. 361 (Fed. C.A.).

The word guardian is used in this subsection in its narrow legal sense: one who legally has the care and management of the person, or the estate, or both, during the minority of the child. The determination that a person is a guardian must be made on evidence considered trustworthy by the adjudicator upon a balance of probabilities.

*Kissoon v. Min. of Employment & Immigration*, [1979] 1 F.C. 301, 90 D.L.R. (3d) 766, 23 N.R. 82 (Fed. C.A.).

This subsection gives minors the right to be represented by a parent or guardian. This right is distinct from and additional to the right to counsel guaranteed by section 30. Failure to comply with this provision will result in the setting aside of the exclusion order. The Court also held that the applicant may not be excused from testifying because he is a minor.

#### ***Subsection (5)***

*Azdo v. Min. of Employment & Immigration*, [1980] 2 F.C. 645, 36 N.R. 361 (Fed. C.A.).

For digest, see section 29, subheading *Subsection (4), supra*.



*Karim v. Min. of Employment & Immigration*, [1980] 2 F.C. 109 (Fed. C.A.).

The exclusion order in this case was set aside because the adjudicator, without foundation, assumed that the applicant's older sister was in fact her guardian for the purposes of this subsection of the Immigration Act.

*Kissoon v. Min. of Employment & Immigration*, [1979] 1 F.C. 301, 90 D.L.R. (3d) 766, 23 N.R. 82 (Fed. C.A.).

For digest, see section 29, subheading *Subsection (4)*, *supra*.

## RIGHT TO COUNSEL

**30. (1) Every person with respect to whom an inquiry is to be held shall be informed of the person's right to obtain the services of a barrister or solicitor or other counsel and to be represented by any such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense. 1976-77, c. 52, s. 30; R.S.C. 1985 (4th Supp.), c. 28, s. 9; 1990, c. 8, s. 51; 1992, c. 49, s. 19.**

*Afrane v. Canada (Min. of Employment & Immigration)* (1993), 14 Admin. L.R. (2d) 201, 20 Imm. L.R. (2d) 312, 64 F.T.R. 1.

This was an application for judicial review to quash an exclusion order. The issue was whether the applicant had been denied the right to counsel by reason of the adjudicator refusing an adjournment.

The applicant and his counsel had agreed to proceed on December 16, 1992 with a resumption of the applicant's inquiry. Subsequent to agreeing to this date, the applicant retained new counsel and on December 16 the applicant attended with a letter from his new counsel, which letter indicated that the applicant's new counsel was unable to attend on December 16 and suggested dates in January to resume the inquiry. The adjudicator refused the adjournment.

This decision reviewed a number of cases dealing with the right to counsel. The Court noted that the refusal to adjourn so that counsel might attend has been upheld on appeal where there were enumerable adjournments and attempts to agree on dates to proceed and where the hearing to proceed was scheduled peremptorily.

The Court noted that there was no suggestion that the applicant or his counsel had deliberately attempted to delay the process and further that the resumption of the inquiry had not been scheduled peremptorily. Further, counsel's request to adjourn the December 16 proceeding was the first adjournment requested.

Accordingly, the exclusion order was quashed and the matter was returned to a new adjudicator for resumption of the applicant's inquiry.

The Court observed that normally the material in a case of this type should contain a candid and full explanation of the circumstances. On this record there was no indication when the applicant's present counsel was retained and no cogent reason given why counsel did not communicate with the respondent in advance of December 16, 1992 to indicate his unavailability and to discuss alternative dates. Further, the Court noted that it was preferable for some description of the prejudice suffered by the applicant to be described in the materials in support of the application. The Court observed that the right to be

represented by counsel is not an absolute right. It is predicated on the parties and counsel acting reasonably in all the circumstances.

*Kamtapersaud v. Canada (Min. of Employment & Immigration)* (1993), 70 F.T.R. 61.

The applicant's mother was the subject of immigration proceedings on the basis that she had overstayed her visitor's permit and accepted employment without being authorized to do so. The first day of the hearing the adjudicator appointed the mother the representative of her three infant children, one of whom was the applicant. The applicant was seventeen years of age at the time and seven weeks short of her eighteenth birthday.

At the inquiry the applicant's mother was found to have overstayed her visitor's permit but not to have engaged in unauthorized employment. The mother's refugee claim was found to have no credible basis.

The credible basis panel then issued a deportation order against the mother and the infant children, including the applicant.

The legislation does not permit an adjudicator to assume all minors are unable to appreciate the nature of the proceedings. The language used in section 29(4) requires the adjudicator to enter into an inquiry on that very question in order to make a determination and form an opinion. The age of the minor in question will play a significant role. Where infants of tender years are involved there may be little doubt with respect to their ability to understand the nature of the proceedings. However, if the minor is of an age which enables her to understand the nature of the proceedings and would permit her to make constructive representations concerning her own interests, her guarantee to representation by counsel, as provided for in section 30(1), and her right to make submissions at the inquiry pursuant to section 33(2) is not satisfied merely by the appointment of a parent or guardian. Such an appointment may, in some cases, satisfy those requirements but the duty of fairness which rests on an adjudicator requires him or her to make such inquiries as are necessary to ensure that this is so.

The deportation order against the applicant was set aside.

*Dehghani v. Canada (Min. of Employment & Immigration)*, [1993] 1 S.C.R. 1053, 18 Imm. L.R. (2d) 245, 10 Admin. L.R. (2d) 1, 20 C.R. (4th) 34, 101 D.L.R. (4th) 654, 150 N.R. 241, 14 C.R.R. (2d) 1.

The appellant, a citizen of Iran, arrived in Canada without valid travel or identity documents and claimed Convention refugee status. He was interviewed at the secondary examination and extensive written notes were made by an immigration officer, which notes were later entered in evidence at the credible-basis hearing. At the conclusion of that hearing the first level tribunal decided that there was no credible basis to the appellant's claim. When the appellant was taken to a secondary examination at Canadian Immigration at Pearson Airport, he was not detained in the sense contemplated by section 10(b) of the Charter.

Further, the principles of section 10(b) do not require that the appellant be provided with counsel at the pre-inquiry or pre-hearing stage of the refugee claim determination process. The secondary examination of the appellant at the port of entry is not analogous to a hearing. The purpose of the port-of-entry interview was to aid in the processing of the appellant's application for entry and to determine the appropriate procedures which

should be invoked in order to deal with the appellant's application for Convention refugee status. The principles of fundamental justice do not include a right to counsel in these circumstances of routine information gathering.

*Edumadze v. Canada (Min. of Employment & Immigration)* (1993), 59 F.T.R. 269 (Fed. T.D.).

This is an example of a case where an adjudicator's decision to proceed in the absence of counsel was not quashed. The Court noted that if every refugee claimant was entitled to judicial review because of the non-availability of counsel, the system would be in chaos. In this case five adjournments were granted, two of which were peremptory, before the decision was made to proceed in the absence of counsel.

*Ha v. Canada (Min. of Employment & Immigration)* (1992), 8 Admin. L.R. 59, 56 F.T.R. 74 (Fed. T.D.).

An immigration officer rejected the applicant's request for landing on humanitarian and compassionate grounds. An order was also sought prohibiting the commencement of the credible basis hearing until such time as a new humanitarian and compassionate interview was conducted. The applicant was a refugee claimant from Hong Kong. He was in the refugee backlog and received a notice to attend an interview to determine whether sufficient humanitarian and compassionate grounds existed to grant landing. Counsel for the applicant was unable to attend this interview due to short notice. He did write a four-page letter in which he requested that the interview be rescheduled. The immigration officer who conducted the interview declined to reschedule and concluded that no sufficient humanitarian and compassionate grounds existed to justify landing the applicant.

There is no obligation under subsection 114(2) to conduct an interview or hearing. There is no authority for the submission that the claimant is entitled to be represented by counsel once an interview is offered. The right to counsel is dealt with in section 30 of the Act and in sections 27 to 39 of the Regulations. These provisions refer to the right to counsel at an inquiry. There is no corresponding statutory right to counsel during a subsection 114(2) interview.

Given that an interview is offered there is a duty to act fairly. The concept of what constitutes procedural fairness in purely administrative proceedings varies depending on the type and nature of the proceedings, the nature of the rights involved, possible burdens of the process and the possibility of harm if an adverse decision is reached. The applicant has no legal right to remain in Canada until such time as he is found to be a Convention refugee. The determination of whether humanitarian and compassionate grounds exist is discretionary and can be made without personal appearance. It is a decision that involves no complex legal issues. A negative determination does not lead to removal, but rather the claim then proceeds to the next stage in the process, an oral hearing into the merits, at which time there is a right to legal representation. The duty of fairness dictates that the *audi alteram partem* principle be adhered to and in many instances this will require the services of a qualified interpreter.

The Court concluded that there was no procedural unfairness and dismissed the application.

*Editor's Note:* The Act and the Regulations have been amended, but the principle may still be important.



*Basdeo v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-87-84, June 4, 1984.

Counsel for the applicant wanted to adjourn this section 28 application until judgments of the Supreme Court of Canada had been rendered in a series of appeals attacking the procedure set out in section 71(1) [old Act] of the Immigration Act. No section 28 application was ever brought from the decision of the Immigration Appeal Board in this case and the time for so doing has long since expired. Therefore, that decision of the Immigration Appeal Board was not open to collateral attack in this review application which sought to set aside an exclusion order made after the resumption of the applicant's inquiry following the disposition of his refugee claim. The motion for adjournment was dismissed.

The sole ground for attacking the exclusion order was the incompetence of the applicant's counsel. Counsel was chosen by the applicant after having been properly advised of his right to be represented by legally trained counsel. The applicant understood his counsel's degree of competence in the English language and the quality of representation in no way affected the outcome of the inquiry, therefore, the section 28 application was dismissed.

*Tam v. Min. of Employment & Immigration*, [1983] 2 F.C. 31, 46 N.R. 1 (Fed. C.A.).

An inquiry was adjourned for the applicant to seek consideration from the Minister under section 115(2) of the Act. On June 15, 1982, when the inquiry resumed, the applicant had received no final decision, although the Minister had undertaken to give one after consulting his local officials. The adjudicator refused a further adjournment and ordered the applicant deported. The deportation order was quashed because fairness required that the inquiry not proceed until the applicant had received the Minister's answer. The deportation order was also set aside, per Heald J., because the adjudicator erred in refusing to allow the applicant's counsel to make submissions with respect to the section 115(2) application.

*Cheung v. Min. of Employment & Immigration* (1981), 122 D.L.R. (3d) 41, 36 N.R. 563 (Fed. C.A.).

The applicant has the right to cross-examine any witness presented by the case presenting officer. An adjudicator can only refuse to allow the person concerned to present evidence and cross-examine when there are proper grounds for so doing. Where this right to cross-examine is interfered with improperly, a deportation order will be set aside.

*So v. Min. of Employment & Immigration*, [1980] 1 F.C. 453 (Fed. C.A.).

Where the applicant has retained qualified counsel, and where that counsel sends a less qualified associate who is not a member of the bar, the applicant cannot claim that the failure of her counsel to make submissions that ought to have been made, amounts to a denial of natural justice.

*Monfort v. Min. of Employment & Immigration*, [1980] 1 F.C. 478, 105 D.L.R. (3d) 463, 30 N.R. 174 (Fed. C.A.).

It was held that the immigration officer who first interviewed the applicant upon his arrival at the Toronto International Airport and who informed the applicant of the

possibility of withdrawing the application to enter Canada and of the consequences of withdrawing or not withdrawing that application was not obliged to further inform the applicant at that stage of the matter of his right to counsel. A distinction was drawn between the requirements of the Act and Regulations that a person be informed of his right to counsel at an inquiry. It was also noted that there was no provision, under section 23(3), for the right to counsel at a pre-inquiry stage such as the proceedings before the senior immigration officer.

*Sewjattan v. Min. of Employment & Immigration*, [1979] 2 F.C. 256 (Fed. C.A.).

The applicant expressed a desire to retain counsel and, initially, was given a 30-minute adjournment to do so. The deportation order was set aside because the adjudicator had informed the applicant of his right to counsel in a manner which left the impression that that 30-minute period was the only period which would be allowed to the applicant to arrange for the presence of counsel.

*Pierre v. Min. of Manpower & Immigration*, [1978] 2 F.C. 849, 21 N.R. 91 (Fed. C.A.).

This section 28 application to set aside a deportation order was refused because the Court concluded that the applicant was well aware of his right to counsel and his obligation with respect to producing counsel, and had ample opportunity to produce competent counsel to represent him. The applicant had more than one counsel and many adjournments were granted. Finally, after retaining new counsel, the applicant again sought an adjournment which was refused, at which point counsel withdrew. The Court held that the special inquiry officer did not lose his jurisdiction by proceeding in the absence of counsel.

*Molina v. Min. of Manpower & Immigration* (1975), 12 N.R. 317 (Fed. C.A.).

A deportation order was quashed because of the cumulative effect of a number of inadequacies in the conduct of the special inquiry, none of which, taken alone, would have provided a sufficient basis for quashing the order. There was a failure to explain to the applicant his right to counsel in terms he would understand. There was a short adjournment to a pre-emptory date, when no further assistance was given in eliciting information from the applicant as to his success or lack thereof in obtaining counsel. There was a failure to inform the applicant fully and properly of the purpose of the inquiry and the possible results flowing therefrom.

### ***DECISION AFTER INQUIRY — Person informed of basis for order.***

**31. (1) An adjudicator shall give a decision as soon as possible after an inquiry has been completed.**

**(2) Where the decision of an adjudicator results in the making of a removal order or conditional removal order against a person, the adjudicator shall inform the person of the basis on which the order was made. 1976-77, c. 52, s. 31; R.S.C. 1985 (4th Supp.), c. 28, s. 10; 1992, c. 49, s. 20.**

**WHERE PERSON SHALL BE ALLOWED TO COME INTO OR REMAIN IN CANADA — Where person is a permanent resident — Departure order — Where immigrant shall be granted landing — Terms and conditions — Removal where seeking admission — Deportation or departure of other than permanent residents — Departure of other than permanent residents.**

32. (1) Where an adjudicator decides that a person who is the subject of an inquiry is a person described in subsection 14(1) or a person who has a right to remain in Canada, the adjudicator shall let that person come into Canada or remain therein, as the case may be.

(2) Where an adjudicator decides that a person who is the subject of inquiry is a permanent resident described in subsection 27(1), the adjudicator shall, subject to subsections (2.1) and 32.1(2), make a deportation order against that person.

(2.1) Where a person referred to in subsection (2) is a person described in paragraph 27(1)(b), the adjudicator may, subject to subsection 32.1(2.1), make a departure order against the person if the adjudicator is satisfied that the person should be allowed to return to Canada without the written consent of the Minister and that the person will leave Canada within the applicable period specified in the regulations for the purposes of subsection 32.02(1).

(3) Where an adjudicator decides that a person who is the subject of an inquiry is a person who, at the time of his examination, was seeking landing and that it would not be contrary to any provision of this Act or the regulations to grant landing to that person, the adjudicator shall

- (a) grant landing to that person, or
- (b) authorize that immigrant to come into Canada on condition that the immigrant present himself for further examination by an immigration officer within such time and at such place as the adjudicator may direct.

(3.1) An adjudicator who grants landing to a person pursuant to paragraph (3)(a)

- (a) shall, if the person is of a class of immigrants for which regulations made under paragraph 114(ii.2) require the imposition of terms and conditions, impose the terms and conditions prescribed by those regulations; and
- (b) subject to regulations made under paragraph 114(1)(ii.4), may, in the case of any person, impose terms and conditions prescribed by regulations made under paragraph 114(1)(ii.3).

(4) Where an adjudicator decides that a person who is the subject of an inquiry is a person who, at the time of his examination, was seeking entry and that it would not be contrary to any provision of this Act or the regulations to grant entry to that person, the adjudicator may grant entry to that person



and, except in the case of a person who may be granted entry pursuant to subsection 19(3), impose terms and conditions of a prescribed nature.

(5) Where an adjudicator decides that a person who is the subject of an inquiry is a person who, at the time of the person's examination, was seeking admission and is a member of an inadmissible class, the adjudicator shall, subject to subsection 32.1(3),

(a) make a deportation order against that person, if that person is a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k) or (l) or 19(2)(a) (a.1) or (b); or

(b) make an exclusion order against that person, if that person is a member of an inadmissible class other than an inadmissible class referred to in paragraph (a).

(6) Where an adjudicator decides that a person who is the subject of an inquiry is a person described in subsection 27(2), the adjudicator shall, subject to subsections (7) and 32.1(5), make a deportation order against that person.

(7) Where the person referred to in subsection (6) is a person other than a person described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k) or (l) or 27(2)(h) or (i), the adjudicator may, subject to subsection 32.1(5), make a departure order against the person if the adjudicator is satisfied that the person should be allowed to return to Canada without the written consent of the Minister and that the person will leave Canada within the applicable period specified in the regulations for the purposes of subsection 32.02(1). 1976-77, c. 52, s. 32; R.S.C. 1985, c. I-2, s. 32; R.S.C. 1985 (3d Supp.), c. 30, s. 5; R.S.C. 1985 (4th Supp.), c. 28, s. 11; 1992, c. 49, s. 21.

### *Subsection (2)*

*Chiarelli v. Canada (Min. of Employment & Immigration)*, [1992] 1 S.C.R. 711, 16 Imm. L.R. (2d) 1.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of 5 years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to the SIRC. The report indicated

that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of the SIRC and directed the appellant Minister to issue a certificate under section 82(1) with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

The SIRC conducted its investigation and hearing first by reading a document entitled "Statement of Circumstances" as well as two summaries of information. The first day's hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition imposed by section 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident's right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the Appeal Board's decision or substitute his decision as he deemed just and proper. The 1966 *White*

*Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision as to whether to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

*Gressman v. Min. of Manpower & Immigration*, [1981] 1 F.C. 667 (Fed. C.A.).

The adjudicator was correct in deciding that he had no jurisdiction to review a previous decision denying landing status to the applicant. The adjudicator correctly concluded that his jurisdiction was to determine whether or not landing status had been in fact previously granted.



**Subsection (3)**

*Sidhu v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-259-80, June 19, 1980.

The exclusion order was set aside because the adjudicator failed first to determine whether the applicant at the time of her examination by an immigration officer had in fact sought admission as a visitor or as an immigrant. The Court also pointed out that whether or not the applicant sought admission as a visitor was a question entirely distinct from the question of whether or not she was a genuine or *bona fide* visitor within the meaning of section 19(1)(h).

**Subsection (4)**

*Sidhu v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-259-80, June 19, 1980.

For digest, see section 32, subheading *Subsection (3), supra*.

**Subsection (5)**

*Smart v. Canada (Min. of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 266, 134 N.R. 76 (Fed. C.A.).

The applicant came from Costa Rica and was admitted as a visitor. While in Canada, she married a Canadian who took steps to sponsor her application for landing. An Order-in-Council had not yet been adopted to relieve the applicant from the obligation to obtain an immigrant visa outside of Canada when her husband withdrew his application for sponsorship. The applicant's marriage had broken down and the husband had instituted divorce proceedings. The applicant went to an Immigration Centre and asked permission to be allowed to remain in Canada for humanitarian reasons while her application for permanent residence was being processed. While that application was pending, a section 27 report was made alleging that the applicant had remained in Canada after ceasing to be a visitor. While that inquiry was proceeding, the request to remain in Canada was disposed of negatively by the Minister. The inquiry proceeded to a conclusion and a deportation order was made against the applicant. The deportation order was attacked on the ground that the policy which lead to the refusal of the request to remain in Canada offended section 15 of the Charter. The Court declined to give effect to this argument. The adjudicator committed no error of law. His role was merely to determine whether the allegation made against the appellant was well founded and whether a deportation order or departure notice should be made. The adjudicator had no power to pass judgment on the legality of the direction enjoining him to hold the inquiry or on the validity of a policy that he, himself, did not have to apply.

**Subsection (7)**

*Jeffery v. Canada (Min. of Employment & Immigration)* (1993), 151 N.R. 190 (Fed. C.A.).

The adjudicator decided not to issue a departure notice because he relied on circumstances which were conclusions based on pure speculation without supporting

evidence, including the speculative possibility of the applicant returning to Canada and again abusing the refugee determination system. A breach of the Immigration Act cannot, alone, be a circumstance supporting the exercise of discretion to refuse a departure notice because everyone liable to be deported has breached the Act in some way and Parliament must have had something more in mind in giving adjudicators the discretion it did. The unsuccessful pursuit of a refugee claim is a circumstance from which a present unwillingness to leave Canada can be inferred.

*Khan v. Canada (Min. of Employment & Immigration)* (1992), 54 F.T.R. 150.

The applicant sought an order staying a departure notice issued by the respondent. The Court concluded that it had no jurisdiction to stay the departure notice. The Court noted that section 50 of the Immigration Act provides that removal orders can be stayed in certain circumstances but is silent with respect to departure notices. Once a departure notice is issued the Minister has no authority to force the applicant to leave by the specified date. If the applicant chooses to remain beyond the specified date then the Minister can convene another inquiry and a deportation order may be issued. At that point the court will have jurisdiction over the matter.

*Ali v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 27, 103 N.R. 393 (Fed. C.A.).

The applicant was a citizen of Bangladesh. He entered Canada as a visitor and ultimately claimed to be a Convention refugee. This claim was rejected and the applicant was finally ordered deported. The adjudicator was not satisfied that the applicant would return to Bangladesh. In that respect, her decision to make a deportation order was not open to challenge. However, the applicant had arranged for temporary admission to the United States for the purpose of applying for a visa admitting him to Canada. He had been unable to leave Canada and seek lawful admission during the inquiry because the Minister had his passport. Section 32(6)(b) speaks of a willingness to leave Canada, not of a willingness to return or go to a particular country. Certainly, the avowed willingness to leave Canada must be assessed realistically. It must be supported by evidence establishing, on a balance of probabilities, that the country to which the person concerned is willing to go is willing to admit him. In this case, arrangements had been made to have the applicant admitted to the United States for 48 hours. While there was no guarantee that the U.S. would admit him, it was sheer speculation to consider the possibility that they might not. The deportation was quashed and the matter remitted to the adjudicator.

*Medeiros v. Canada (Min. of Employment & Immigration)* (1988), 5 Imm. L.R. (2d) 92 (Fed. C.A.).

This section 28 application was made to set aside a deportation order. In deciding to deport the applicant rather than issue a departure notice, the adjudicator placed much reliance on the circumstance that the applicant worked illegally in Canada and, "thereby, abused the refugee determination system." Parliament did not intend that breaches of various provisions of the Act should be the only matters considered in the exercise of the adjudicator's discretion.

With respect to the decision that the applicant would not leave Canada on a date specified in a departure notice, this finding was set aside as being made without regard to the evidence. The adjudicator described the applicant's testimony as candid and

straightforward. The applicant had testified that he was willing to leave Canada by airplane on a date specified and that he had sufficient money to purchase his ticket. Accordingly, the finding by the adjudicator to the contrary was unsupported by the evidence.

*Wing Chiu Yan v. Canada (Min. of Employment and Immigration)* (1987), 4 Imm. L.R. (2d) 90, 84 N.R. 210 (Fed. C.A.).

In this case, the applicant was ordered deported on the basis of his having overstayed and engaged in unauthorized employment. The decision to deport him was set aside. The fact that the applicant deliberately overstayed in itself cannot be a determining factor in the deport/depart decision.

*Stephens v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-854-85, September 4, 1986.

The Court qualified its decision in *Frankie Hak Wo Lau*. That case was held to stand for the proposition that it was in error for the adjudicator to conclude that by reason of the simple fact of a breach of the Immigration Act any possibility of issuing a departure notice was, therefore, foreclosed.

*Hopkins v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-183-85, December 6, 1985.

The deportation order was set aside because the adjudicator ordered the applicant deported and one of her infant children but not the other. Ignoring the existence in Canada of the latter child, the adjudicator had failed entirely to consider the evidence adduced by the applicant in relation to that child. Accordingly, the Court could not be certain that the adjudicator had regard to certain evidence that might well have influenced him not to order deportation but, rather, to issue a departure notice.

*Bredwood v. Min. of Employment & Immigration* (1984), 59 N.R. 316 (Fed. C.A.).

The applicant's attack was limited to the adjudicator's decision making a deportation order rather than issuing a departure notice. There was no evidence whatever to the applicant's credit to be weighed in the balance against her wilful and deliberate violation of Canadian immigration laws. Thus, the decision to make a deportation order was not subject to attack.

The courts distinguished this case from *Lau v. Min. of Employment & Immigration*, [1984] 1 F.C. 434 (Fed. C.A.), on the ground that in that case there was a good deal of evidence before the adjudicator reflecting on the credit of Mr. Lau which was ignored by the adjudicator in making a deportation order.

*Lau v. Min. of Employment & Immigration*, [1984] 1 F.C. 434, 6 D.L.R. (4th) 676, 52 N.R. 63 (Fed. C.A.).

The applicant was ordered deported because he was a person described in section 27(2)(b) and (e) of the Immigration Act. In practically every case of this nature, the actions of the applicant are deliberate and wilful in that the applicant consciously overstays and consciously accepts employment without authorization. These circumstances by themselves are not always sufficient to entitle an adjudicator to decline to issue a departure notice. The adjudicator must have regard to *all* of the circumstances of the case in making his deport/depart decision.



*Wander v. Min. of Employment & Immigration* (1983), 52 N.R. 384 (Fed. C.A.).

Dilatory tactics by the person concerned or his counsel may very well serve as an indication of an unwillingness to leave Canada and, thus, may be properly considered by an adjudicator in deciding whether a departure notice ought to issue.

*Beeston v. Min. of Employment & Immigration* (1982), 132 D.L.R. (3d) 766, 41 N.R. 260 (Fed. C.A.).

The decision of the adjudicator to issue a deportation order rather than a departure notice was upheld. The Court held that the adjudicator was justified in viewing, as a very important circumstance, the fact that the applicant had remained in Canada illegally and without status since September 1976. However, the adjudicator did specifically consider the other circumstances of the case prior to exercising his discretion.

*Stalony v. Min. of Employment & Immigration* (1980), 36 N.R. 609 (Fed. C.A.).

The appellant's intention to appeal an adjudicator's decision to the Federal Court is not of itself sufficient reason for an adjudicator to refuse to exercise his discretion under this section. However, where this intention to appeal was only one of the considerations which the adjudicator took into account and where other factors existed which suggested that the applicant would not, or could not, leave by a specified date, the decision to make a deportation order was not set aside. The other factors were the inability of the applicant to say how long it would take him to wind up his affairs and the uncertainty as to where he would go due to his stated preference to remain in Canada and not return to his home country.

### ***EXAMINATION OF PERSON SUBJECT TO DEPARTURE ORDER.***

**32.01** A person against whom a departure order has been made shall appear or be brought before an immigration officer so that the immigration officer can verify the person's departure from Canada and issue a certificate of departure in the prescribed form to the person. 1992, c. 49, s. 22.

#### ***WHERE CERTIFICATE ISSUED — Deemed deportation — Exception.***

**32.02 (1)** Where no certificate of departure is issued within the applicable period specified in the regulations to a person against whom a departure order has been made, the departure order is deemed to be a deportation order made against the person.

**(2)** Where by the operation of subsection (1) a departure order made against a person is deemed to be a deportation order and the person is at that time no longer in Canada, the person is deemed to have been deported from Canada.

**(3)** Subsection (1) does not apply to any person who is detained under this Act at any time after

**(a)** where a conditional departure order was made against the person, the day on which the conditional departure order became effective, or

(b) where a departure order was made against the person, the day on which the departure order was made,

and who is still in detention under this Act at the expiration of the applicable period specified in the regulations for the purposes of subsection (1). 1992, c. 49, s. 22.

**DEFINITION OF “CLAIMANT”** — *Where claimant is a permanent resident — Conditional departure order — Where claimant seeking admission — Where claimant not a permanent resident — Conditional departure order — When conditional offer becomes effective.*

32.1 (1) In this section, “claimant” means a person who claims to be a Convention refugee and whose claim has been referred

(a) to a senior immigration officer for a determination of whether the person is eligible to make such a claim; or

(b) to the Refugee Division for a determination of the claim.

(2) Where an adjudicator decides that a claimant who is the subject of an inquiry is a permanent resident described in subsection 27(1), the adjudicator shall, subject to subsection (2.1), make a conditional deportation order against the claimant.

(2.1) Where a claimant referred to in subsection (2) is a person described in paragraph 27(1)(b), the adjudicator may make a conditional departure order against the claimant if the adjudicator is satisfied the the claimant should be allowed to return to Canada without the written consent of the Minister and that the claimant will leave Canada within the applicable period specified in the regulations for the purposes of subsection 32.02(1).

(3) Where an adjudicator decides that a claimant who is the subject of an inquiry is a person who, at the time of the claimant’s examination, was seeking admission and is a member of an inadmissible class, the adjudicator shall

(a) make a conditional deportation order against the claimant, if the claimant is a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k), or (l) or 19(2)(a) (a.1) or (b); or

(b) make a conditional departure order against the claimant if the claimant is a member of an inadmissible class other than an inadmissible class referred to in paragraph (a).

(4) Where an adjudicator decides that a claimant who is the subject of an inquiry is a person described in subsection 27(2), the adjudicator shall, subject to subsection (5), make a conditional deportation order against the claimant.

(5) Where the claimant referred to in subsection (4) is a person other than a person described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k)

or (l) or 27(2)(h) (i), the adjudicator may make a conditional departure order against the claimant if the adjudicator is satisfied that the person should be allowed to return to Canada without the written consent of the Minister.

(6) No conditional removal order made against a claimant is effective unless and until

- (a) the claimant withdraws the claim to be a Convention refugee;
  - (a.1) the claimant is determined by a senior immigration officer not to be eligible to make a claim to be a Convention refugee and has been so notified;
  - (b) the claimant is declared by the Refugee Division to have abandoned the claim to be a Convention refugee and has been so notified;
  - (c) the claimant is determined by the Refugee Division not to be a Convention refugee and has been so notified; or
  - (d) the claimant is determined pursuant to subsection 46.07(2) not to have a right under subsection 4(2.1) to remain in Canada and has been so notified.
- R.S.C. 1985 (4th Supp.), c. 28, s. 12; 1992, c. 49, s. 23.

*WHERE DEPENDANTS — Hearing required — Deeming provision.*

33. (1) Where a removal order or conditional removal order is made by an adjudicator against a member of a family on whom other members of the family in Canada are dependent for support, any member of the family dependent on that member may be included in that order and be removed from or required to leave Canada unless the dependant is a Canadian citizen or a permanent resident nineteen or more years of age.

(2) No person may be included in an order under subsection (1) unless the person has been given an opportunity to be heard at an inquiry.

(3) A person who is included in a deportation order or conditional deportation order pursuant to subsection (1) shall, except for the purposes of subsection 55(1), be deemed to be a person against whom a deportation order or conditional deportation order, as the case may be, has been made. 1976-77, c. 52, s. 33; R.S.C. 1985 (4th Supp.), c. 28, s. 12; 1992, c. 49, s. 24.

*Subsection (1)*

*Hopkins v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-183-85, December 6, 1985.

The deportation order was set aside because the adjudicator ordered the applicant deported and one of her infant children but not the other. Ignoring the existence in Canada of the latter child, the adjudicator had failed entirely to consider the evidence adduced by the applicant in relation to that child. Accordingly, the Court could not be certain that the adjudicator had regard to certain evidence that might well have influenced him not to order deportation but, rather, to issue a departure notice.



*Morataya v. Min. of Manpower & Immigration*, [1977] 1 F.C. 571, 15 N.R. 421 (Fed. C.A.).

This case provides an example of a situation where members of a family ordinarily dependent on persons subject to inquiry were found not to be financially dependent on such persons during their stay in Canada.

*Denis v. R.*, [1976] 1 F.C. 499 (Fed. C.A.).

The appellant, a child and a Canadian citizen, contended that to deport her mother would violate the Canadian Bill of Rights since it would oblige her mother to take her with her thus exiling the appellant. The Court stated that proper relief for the appellant lies in the discretion of the Immigration Appeal Board to grant compassionate or humanitarian relief. However, it was doubtful whether it could be said that deporting the mother resulted in arbitrary exile or cruel and unusual punishment for the child.

*Moshos v. Min. of Manpower & Immigration*, [1969] S.C.R. 886, 7 D.L.R. (3d) 180 (S.C.C.).

Under the Immigration Act, R.S.C. 1952, proper notice to a dependent family member required that the dependant be told that he or she had the right to an opportunity to establish that he or she should not be included in the deportation order. A mere reading of the section allowing dependent family members to be included when the family member was on the stand as a witness was held to be insufficient compliance.

### ***Subsection (2)***

*Kamtapersaud v. Canada (Min. of Employment & Immigration)* (1993), 70 F.T.R. 61.

The applicant's mother was the subject of immigration proceedings on the basis that she had overstayed her visitor's permit and accepted employment without being authorized to do so. The first day of the hearing the adjudicator appointed the mother the representative of her three infant children, one of whom was the applicant. The applicant was seventeen years of age at the time and seven weeks short of her eighteenth birthday.

At the inquiry the applicant's mother was found to have overstayed her visitor's permit but not to have engaged in unauthorized employment. The mother's refugee claim was found to have no credible basis.

The credible basis panel then issued a deportation order against the mother and the infant children, including the applicant.

The legislation does not permit an adjudicator to assume all minors are unable to appreciate the nature of the proceedings. The language used in section 29(4) requires the adjudicator to enter into an inquiry on that very question in order to make a determination and form an opinion. The age of the minor in question will play a significant role. Where infants of tender years are involved there may be little doubt with respect to their ability to understand the nature of the proceedings. However, if the minor is of an age which enables her to understand the nature of the proceedings and would permit her to make constructive representations concerning her own interests, her guarantee to representation by counsel, as provided for in section 30(1), and her right to make submissions at the inquiry pursuant to section 33(2) is not satisfied merely by

the appointment of a parent or guardian. Such an appointment may, in some cases, satisfy those requirements but the duty of fairness which rests on an adjudicator requires him or her to make such inquiries as are necessary to ensure that this is so.

The deportation order against the applicant was set aside.

*Re Rodney and Min. of Manpower & Immigration*, [1972] F.C. 663, 27 D.L.R. (3d) 756 (Fed. C.A.).

A dependent family member, the wife, was sworn as a witness at an inquiry against her husband. She was then warned that she could be included in her husband's deportation order and advised that she had the right to be represented by counsel. The wife was then asked to establish why she should not be included in the order. The Court held that such conduct by the inquiry officer gave her insufficient time to prepare an answer.

*Moshos v. Min. of Manpower & Immigration*, [1969] S.C.R. 886, 7 D.L.R. (3d) 180 (S.C.C.).

For digest, see section 33, subheading *Subsection (1), supra*.

### **FURTHER INQUIRIES MAY BE HELD.**

**34. No decision given under this Act prevents the holding of a further inquiry by reason of the making of another report under paragraph 20(1)(a) or subsection 27(1) or (2) or by reason of arrest and detention for an inquiry pursuant to section 103. 1976-77, c. 52, s. 34.**

*Cortez v. Canada (Secretary of State)* (1994), 74 F.T.R. 9.

The applicant came to Canada in 1987. The record does not indicate his status, but he was not a Canadian citizen or a permanent resident at the time of this case. The applicant was convicted of impaired driving on September 19, 1989. Two other convictions followed on October 23, 1989 and March 16, 1990. The latter convictions related to having a blood alcohol level higher than .08. A report was made on November 5, 1990. This report provided that the applicant was described in section 27(2)(a) in that he was inadmissible by virtue of section 19(2)(b)(i). On December 1, 1992 an inquiry was held and the adjudicator, relying on *Ruparel v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 615, 11 Imm. L.R. (2d) 190, 36 F.T.R. 140, concluded that the allegation that the applicant was inadmissible was not valid.

On February 1, 1993 section 19(2) was amended. On March 2, 1993 a new report was issued in respect of the applicant relying on the same convictions. An inquiry was held in May, 1993 and a deportation order issued.

There was no question of retrospectivity. A determination had to be made at the time of the second inquiry of the applicant's admissibility and that determination had to be made on the facts and the provisions of the Act, namely sections 27(2)(a) and 19(2)(a), as they read after the 1993 amendments.

Section 34 excludes *res judicata* in the specific context of section 27 and therefore the adjudicator had jurisdiction to examine the applicant's admissibility to Canada.

There was no unreasonable delay. The report in question (March 19, 1993) was written approximately one month after the amendments to the Act and the inquiry was held two months later. There was, therefore, no unreasonable delay.

*Canada (Min. of Employment & Immigration) v. Steward* (1991), 132 N.R. 159 (Fed. C.A.).

In an earlier proceeding, the adjudicator was concerned exclusively with the question of whether the respondent's admitted conviction in Oklahoma met the equivalency test of section 19(1)(c). The Court concluded that the adjudicator was correct in deciding that there was absolutely no evidence from which he could properly decide that there was equivalency in that previous proceeding. That finding did not preclude the Minister from considering the previous conviction together with proper evidence of equivalency in determining whether or not the respondent, Steward, should be granted landing. The finding also did not bar the holding of a further inquiry pursuant to section 34 of the Act.

*Estrada v. R.* (1987), 1 Imm. L.R. (2d) 24, 8 F.T.R. 317 (Fed. T.D.).

The applicant was the subject of an immigration inquiry. The inquiry was based on a defective report because the report alleged that the applicant had been convicted of an offence under section 3(1) of the Narcotic Control Act without making it clear that the allegation related to the conviction for an indictable offence under another Act of Parliament and not the Criminal Code. The report was amended. However, during the course of argument, the adjudicator and the case presenting officer became concerned about the validity of the proceedings. The case presenting officer received instructions from her superiors to withdraw the direction. The adjudicator indicated that the procedure being followed was correct and that no withdrawal of the direction was necessary. The case presenting officer requested an adjournment to consider her position, and her request was denied, whereupon she withdrew the direction. A new direction for inquiry was forthcoming. The report alleged that the applicant was convicted of one count of possession of a narcotic contrary to the Narcotic Control Act. This was held not to be an abuse of process. The Court characterized the Minister as having acted in a very cautious way in order to avoid any error of law. The Court found nothing so oppressive or vexatious as to constitute an abuse of process. The fact of the withdrawal of the direction in order to terminate the inquiry, coupled with the allowing of another direction for inquiry to be made and based upon the same facts, although under a different paragraph of section 27, did not, in the circumstances, constitute an abuse of process.

*Rabbat v. Min. of Employment & Immigration*, [1986] 2 F.C. 46 (Fed. T.D.), affirmed January 21, 1987, Doc. No. A-1006-85 (Fed. C.A.), leave to appeal to S.C.C. refused S.C.C., Doc. No. 20315, June 4, 1987.

The applicant held the status of permanent resident since 1972. In December 1981, he was arrested. Shortly afterwards, an immigration officer filed a report pursuant to section 27(2) reporting that the applicant was described in section 19(1)(c). The adjudicator concluded that the applicant was a permanent resident and, therefore, a person not described in the report. Two years after this decision, a senior immigration officer signed a new report based on the same facts but under section 27(1). Section 34 of the Act was held to exclude the principle of *res judicata* for all practical purposes in the specific context of the sections to which it referred. The delay was not so unreasonable as to constitute an injustice of the type described in section 7 of the Charter.



*R. v. Parker*, Man. Q.B., Doc. No. 85-01-00584, July 12, 1985.

An inquiry concerning Mr. Parker was held upon two reports under section 27. At the conclusion of the inquiry, the adjudicator found in Mr. Parker's favour with respect to the allegation under section 27(2)(a) and in favour of the Commission with respect to the allegation under section 27(2)(b). A departure notice was issued to Mr. Parker. The Commission was unhappy with the result, as it had been seeking a deportation order. No appeal of the adjudicator's decision was made; instead, fresh proceedings under section 27(2)(a) were commenced. Mr. Parker was arrested and detained in connection with these new proceedings. The warrant for arrest and the order of detention were quashed and it was determined that the applicant was not properly detained. The Commission, at the time of the first inquiry, was aware of the fact that the applicant had an extensive criminal record. The Commission made a calculated decision to proceed with the information that it could prove and did not seek an adjournment to obtain the information that was the subject of the second inquiry. Thus, the issue to be dealt with on the second inquiry was held to have been already decided as a result of the first inquiry and there was, therefore, no jurisdictional basis for the second inquiry.

*Chi Ming Au v. A.G. Can.*, [1977] 2 F.C. 254 (Fed. T.D.).

The Court emphasized that *res judicata* only applied when the first tribunal was competent and had jurisdiction to hear and determine the matter before it. Accordingly, where the first deportation order was set aside because the special inquiry officer lacked jurisdiction to conduct the inquiry, *res judicata* could not apply. Prohibition has to be sought against a specific individual and the Attorney General of Canada was not in that category.

*Okolakpa v. Lanthier*, [1977] 1 F.C. 437 (Fed. T.D.).

This case was decided under the Immigration Act, R.S.C. 1970, the relevant provisions of which have been worded slightly differently in the present Act. Prohibition was granted where the Minister sought to proceed on a "subsequent report" which was not based on new information but in which the recommendation was based on a different subparagraph of the Immigration Act. The Court of Appeal previously had held that the subparagraph on which the Court originally based its decision was not applicable. Therefore, the petitioner or applicant had a right to a determination of his original application (for an extension of his student visa) which the Court directed should be made forthwith. The decision on the extension of a student visa had not been given pending a summons for further inquiry.

### 35. [Repealed 1992, c. 49, s. 25.]

## NOTICE OF RIGHT OF APPEAL.

36. Where a removal order or conditional removal order is made against any person who has a right of appeal to the Appeal Division pursuant to section 70, the adjudicator shall forthwith inform that person of the right of appeal. 1976-77, c. 52, s. 36; R.S.C. 1985 (4th Supp.), c. 28, s. 13.

### Minister's Permits

*ISSUE OF PERMITS — When permit may not be issued — Conditions of permit — Extension and cancellation — Leaving Canada cancels permit — Deportation order following cancellation of permit — Deportation — Annual report to Parliament.*

37. (1) The Minister may issue a written permit authorizing any person to come into or remain in Canada if that person is

(a) in the case of a person seeking to come into Canada, a member of an inadmissible class; or

(b) in the case of a person in Canada, a person with respect to whom a report has been or may be made under subsection 27(2).

(2) Notwithstanding subsection (1), no permit may be issued to

(a) a person against whom a removal order has been made who has not been removed from Canada pursuant to such an order or has not otherwise left Canada, unless an appeal from that order has been allowed; or

(b) [Repealed 1992, c. 49, s. 26.]

(c) a person in Canada with respect to whom an appeal made pursuant to section 77 has been dismissed.

(3) A permit shall be in force for such period not exceeding three years as is specified in the permit.

(4) The Minister may at any time, in writing, extend or cancel a permit.

(4.1) Unless a permit specifies that a person may leave and re-enter Canada, the permit is cancelled if the person to whom the permit was issued leaves Canada.

(5) The Minister may, on the cancellation or expiration of a permit, make a deportation order against the person to whom the permit was issued or direct that person to leave Canada within a specified period.

(6) Where a person who has been directed by the Minister to leave Canada within a specified period of time fails to do so, the Minister may make a deportation order against that person.

(7) The Minister shall, within thirty days following the commencement of each fiscal year or, if Parliament is not then sitting, within the first thirty days next thereafter that either House of Parliament is sitting, cause to be laid before Parliament a report specifying the number of permits issued during the preceding calendar year and in respect of each permit issued

(a) to a person seeking to come into Canada, the inadmissible class of which that person is a member; or

(b) to a person in Canada, the applicable paragraph of subsection 27(2)

pursuant to which a report has been or may be made. 1976-77, c. 52, s. 37; 1992, c. 49, s. 26.

### *Subsection (1)*

*Dee v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 5, 135 N.R. 241, 53 F.T.R. 85.

This was an appeal from an order of the Trial Division dismissing an application for an order quashing the Minister's decision not to issue the applicant a Minister's Permit and for an order requiring the Minister to give the applicant a fair hearing before deciding whether to issue a Permit. The argument in support of the appeal was based on the Minister's policy to issue Permits to those who had been found to be convention refugees. The appellant knew of that policy and, as a consequence, had a legitimate expectation that the policy would be applied in his case and that he would obtain a Permit as a matter of course. The Court determined that the Minister was not under a duty as a result of the policy and the appellant's expectation to issue a Permit to the appellant. Further, due to the fact that a removal order had been made against the appellant subsequent to the Minister's refusal to issue a Permit and, due to the fact that this removal order was still in effect, no useful purpose was served by this appeal. The Minister could not issue a Permit to the applicant at this point in time. Accordingly, the appeal was dismissed.

*Donoso v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 32, 38 Admin. L.R. 219, 30 F.T.R. 241 (Fed. T.D.).

The applicant is a citizen of Chile who arrived in Canada and made a claim for convention refugee status. He was granted convention refugee status. Prior to being granted permanent resident, he was convicted of several serious criminal offences. The second inquiry was convened to determine whether Mr. Donoso could remain in Canada. During the inquiry, convention refugee status was again sought. Mr. Donoso was informed that his second claim had been accepted. Prior to the resumption of the second inquiry, Mr. Donoso sought an interview for the purpose of establishing the circumstances which favoured a Minister's Permit. The request for an interview was refused as was the Minister's Permit. The resumption of the second inquiry was stayed pending disposition of this case.

In making decisions regarding Minister's Permits, immigration officials are obliged to fulfil the requirements of the duty of fairness. Whether the fairness standard will involve submissions of written materials, oral interviews, formal hearings or legal representations necessarily varies according to the facts of each case. The Charter applies to administrative decisions but, before relief can be provided pursuant to the Charter, the applicant has to demonstrate that the security of his person is threatened as a result of the decision to refuse him a permit. The decision relating to a permit will not cause the applicant to be removed to Chile. It is the adjudicator, upon the resumption of the inquiry, who will issue a departure notice or a deportation order and the decision relating to removal can be appealed. If these appeals are unsuccessful, it will then become necessary to decide to which country the applicant should be removed and the applicant will have opportunities at that time to make representations to the Minister outlining why he should not be returned to Chile. The existence of these numerous steps prior to actual removal



determine that the applicant's life, liberty or security of the person were not threatened by the decision to refuse a Minister's Permit and accordingly the application was dismissed.

*Prasad v. Canada (Min. of Employment & Immigration)*, [1989] 1 S.C.R. 560, [1989] 3 W.W.R. 289, 36 Admin. L.R. 72, 7 Imm. L.R. (2d) 253, 93 N.R. 81, 57 D.L.R. (4th) 663.

The issue was whether the adjudicator of an immigration inquiry must adjourn to enable the person concerned to pursue an application to the Minister under s. 37(1) of the Immigration Act. In a four to two decision, the majority of the Court held that the adjudicator is neither bound to accede to a request for an adjournment to enable an application under s. 37 to be brought, nor is the adjudicator required to refuse it. The adjudicator must consider such factors as the number of adjournments already granted and the length of time for which an adjournment is sought in exercising discretion to adjourn. The adjudicator also must consider the opportunity available to the subject of the inquiry to apply to the Minister prior to the request for an adjournment. The majority of the Court distinguished the case at bar with *Ramawad v. Min. of Manpower & Immigration*, [1978] 2 S.C.R. 375, 81 D.L.R. (3d) 687, 18 N.R. 69 (S.C.C.), and held that *Ramawad* must be read in the context of its facts and the particular employment visa provisions in effect at the time of that decision.

*Min. of Employment & Immigration v. Widmont*, [1984] 2 F.C. 274, 56 N.R. 198 (Fed. C.A.).

The respondent legally entered Canada from Poland. She spoke neither French nor English. The immigration officer spoke no Polish and there was no interpreter. The respondent was admitted for four days. Unaware of this limitation she stayed for a much longer period and married her husband, a Canadian citizen. The respondent sought to clarify her status with the result that a direction for inquiry was issued in her case. She applied for a Minister's permit during the course of the inquiry. Prohibition was granted by the trial division to prevent the inquiry from concluding before the Minister gave his decision on whether to issue a permit. On appeal it was held that the refusal of the adjudicator to adjourn was consistent with earlier decisions of the Federal Court on this question. There is a particularly strong dissent on this question by Mr. Justice MacGuigan and the law of *stare decisis* is described in the judgment of Mr. Justice Urie who concurred in the majority decision. This was important because the majority judgment ruled that previous courts considered the issue raised by this case and, accordingly, the Court in this case was obliged to follow its previous decisions. Mr. Justice Urie noted that the Federal Court of Appeal should refuse to follow its previous decisions only if it was convinced that the earlier decisions were incorrect.

*Dolack v. Min. of Manpower & Immigration*, [1983] 1 F.C. 194, 140 D.L.R. (3d) 767, 45 N.R. 146, affirming in part [1982] 1 F.C. 396 (Fed. C.A.).

The fact that a non-resident has an interest or claim to an interest in property of whatever nature in Canada does not affect the Minister's right to refuse an entry permit if the applicant is a member of an inadmissible class.

*Beeston v. Min. of Employment & Immigration* (1982), 132 D.L.R. (3d) 766, 41 N.R. 260 (Fed. C.A.).

The applicant applied for adjournment so that his request for a Minister's permit could be dealt with directly by the Minister of Employment and Immigration. The adjournment was refused because the manager of the immigration centre in Vancouver had already refused, on behalf of the Minister, the request for issuance of a Minister's Permit. Because this authority had been delegated pursuant to the provisions of section 123 of the Act, it was held that the adjudicator was correct in refusing the request for an adjournment.

*Stalony v. Min. of Employment & Immigration* (1980), 36 N.R. 609 (Fed. C.A.).

Section 37 does not create a right to a ministerial permit; it simply gives to the Minister the power to grant one. The issuance of the deportation order would have deprived the Minister of that power regardless of when the order was made. Therefore, the attack on the validity of the deportation order failed.

*Hardayal v. Min. of Manpower & Immigration*, [1978] 1 S.C.R. 470, 75 D.L.R. (3d) 465, 15 N.R. 396 (S.C.C.).

Granting a Ministerial Permit under the Immigration Act, R.S.C. 1970, c. I-2, was an administrative matter requiring no notice to, or hearing of, the recipient. Such an act was not required to be taken on a judicial or *quasi-judicial* basis. In the opinion of Parliament, power to issue permits was necessary to give flexibility to the administration of immigration policy. The exercise of this power is not subject to any right of a fair hearing. The Minister is required to act fairly and for a proper motive and his failure to do so may well give the person effected the right to take proceedings under section 18(a) of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10. The decision to cancel or not issue a permit is not subject to review under section 28 of the Federal Court Act.

#### **Subsection (4)**

*Singh v. Canada* (1986), 3 F.T.R. 196 (Fed. T.D.).

The Minister's Permit, which the applicant held, and which was dated June 4, 1985, was cancelled. This was done after the Minister's representative, through extensive interviews, had heard very relevant evidence from the applicant and had given the applicant every opportunity to explain his position. Because there are no statutory criteria for the exercise of the discretion to extend or cancel a permit, the discretion is unlimited. Nothing further was required by the Minister to validly exercise his power to cancel the permit. The applicant was not claiming refugee status and had not alleged that any danger to his life, liberty or the security of his person would flow from the cancellation of the Minister's Permit. Thus, there was no interest protected by section 7 of the Canadian Charter of Rights and Freedoms at stake in these proceedings. The content of the "principles of fundamental justice" prescribed in section 7 varies with the nature of the interests involved. Any entitlement the applicant had to remain in Canada pursuant to the Minister's Permit was, in the absence of being admitted for permanent residence, subject to the purely discretionary power of the Minister to cancel his permit.

*Ally v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1080-83, May 15, 1984.

The applicant was issued a Minister's Permit in accordance with the "last remaining family member" policy. Subsequent information established that the applicant was not the last remaining family member. Even though there was no evidence to suggest that the respondent Minister was ever deliberately misled by anyone, there was also no justification for ordering that the applicant be given the benefit of a policy which did not apply to her. The Minister, in refusing to extend the permit, was discharging an administrative responsibility and had not failed in his duty to treat the applicant fairly and, accordingly, the application to quash the deportation order issued against the applicant was dismissed.

*Mauger v. Min. of Employment & Immigration* (1980), 109 D.L.R. (3d) 246 (Fed. T.D.), affirmed (1980), 119 D.L.R. (3d) 54, 36 N.R. 91 (Fed. C.A.).

The cancellation of a permit to remain in Canada is an administrative act and in exercising this power the Minister must act fairly and from a proper motive. The Court concluded that the Minister clearly did so. The applicant entered as a visitor and remained after he ceased to be a visitor. Due to the sponsorship of his wife, he was issued a Minister's Permit. When the sponsorship was withdrawn, the permit was cancelled. The Court noted that the requirements of fairness must be balanced by the dictates of the administrative process under examination. The appellant appraised the immigration commission of his side of the marital story. The Court also held that a person in the position of the appellant is not entitled to counsel during the administrative process.

*Re Manhas*, [1977] 1 F.C. 156 (Fed. T.D.).

When a Ministerial Permit has expired, the holder ceases to have any legal right to remain in Canada.

### **Subsection (5)**

*Min. of Employment & Immigration v. Cembranos-Alvarez*, Fed. C.A., Doc. No. A-267-82, June 6, 1983.

The appellant had remained in Canada without interruption since he had ceased to be a visitor on September 25, 1978. He was during that time a person described in section 27(2)(e), however, as long as he had a Minister's Permit he was entitled to be here. Once the permit expired that entitlement came to an end and he could be the subject of a section 27 inquiry.

### **Subsection (6)**

*Re Gittens*, Fed. T.D., Doc. No. T-2944-82, May 26, 1982.

The applicant came to Canada in 1965 at the age of five. He became a permanent resident but not a Canadian citizen. A deportation order was made based on section 27(1)(d)(i) and (ii) of the Immigration Act. An appeal against the deportation order was dismissed by the Immigration Appeal Board and the Federal Court of Appeal refused leave to appeal the Immigration Appeal Board's decision. The applicant, at the time of the giving of judgment, had completed serving all of the sentences for his criminal



offences and was being kept in custody pending the execution of the deportation order. The application for an order quashing the deportation order against the applicant was dismissed because the Charter is not retrospective in its operation. The application for an order seeking the release of the applicant was denied on the basis that section 10 of the Charter stipulated that the validity of the detention was to be determined by way of *habeas corpus* and the Court noted that it had no jurisdiction to grant *habeas corpus*. The Court did not express an opinion on whether it had jurisdiction to grant *habeas corpus* with *certiorari* in aid, pursuant to the Charter. If execution *per se* of a valid deportation order would constitute an infringement or denial of an applicant's fundamental rights and freedoms, the Court had jurisdiction in the first instance to entertain an application for an appropriate remedy. Freedom of association as envisaged by section 2(d) of the Charter will not be violated by the execution of a deportation order. Execution of the order will sever immediate links with family, friends and others. To the extent that these are licit associations, they are social and familial. Assuming that they are the type of associations contemplated by section 2(d) of the Charter, they are subject to such reasonable limits prescribed by law as can demonstrably be justified in a free society. The reasonableness of the right of a free and democratic state to deport alien criminals was held to be self-evident and, therefore, demonstrably justified. Section 11(h) of the Charter was not violated because deportation was held not to be punishment for the offences, his conviction of which had rendered him liable to deportation in the first place. In this case, the probative value of the evidence of the conditions in Guyana was minimal. The Court accepted that economic conditions and prospects were not nearly as favourable to the individual there as in Canada and that the human rights of persons politically opposed to those in power were not, generally, respected by the Government of Guyana. The Court noted that neither the applicant nor his family had in any way been politically active so as to attract the attention of those in power in Guyana and that, therefore, the treatment the applicant could expect in Guyana would depend entirely upon his conduct there. Thus, the Court concluded that the evidence did not support the claim that execution of the deportation order would deprive the applicant of the right to life, liberty and security of the person afforded by section 7 and, therefore, the Court declined to grant relief.

Finally, the Court noted that the incidents of deportation, whatever their degree, do not render deportation a cruel and unusual treatment of an adult. As a norm, execution of a deportation order is not in the abstract rule an unusual treatment. The Court was not persuaded by the evidence that deportation of the applicant to Guyana would be cruel and unusual treatment in the context of this case. Accordingly, the application was dismissed.

***LANDING AUTHORIZED BY GOVERNOR IN COUNCIL — Consent of province required.***

**38. (1)** Notwithstanding any other provision of this Act or the regulations, but subject to subsection (2), the Governor in Council may authorize the landing of any person who at the time of landing has resided continuously in Canada for at least five years under the authority of a written permit issued by the Minister under this Act.

**(2)** Where the Minister has entered into an agreement with a province

pursuant to section 108 whereby the province has sole responsibility for the selection of certain classes of immigrants who intend to reside in that province, an immigrant of any of those classes of immigrants who intends to reside in that province may be granted landing under subsection (1) only if the province has given its consent. 1976-77, c. 52, s. 38; 1992, c. 49, s. 27.

### **PURPOSE OF PROVISIONS.**

38.1 Recognizing that persons who are not Canadian citizens or permanent residents have no right to come into or remain in Canada and that permanent residents have only a qualified right to do so, and recognizing the necessity of cooperation with foreign governments and agencies in maintaining national security, the purposes of sections 39 to 40.2 are

- (a) to enable the Government of Canada to fulfill its duty to remove persons who constitute a threat to the security or interests of Canada or whose presence endangers the lives or safety of persons in Canada;
- (b) to ensure the protection of sensitive security and criminal intelligence information; and
- (c) to provide a process for the expeditious removal of persons found to be members of an inadmissible class referred to in section 39 or 40.1. 1992, c. 49, s. 28.

### **Safety and Security of Canada**

**DEFINITION OF “REVIEW COMMITTEE”** — *Report, notice and referral — Notice — Filing of a document — Application of the Canadian Security Intelligence Service Act — Statement to be sent to person affected — Idem — Report to Governor in Council — Report to person concerned.*

39. (1) In this section and section 40, “Review Committee” has the meaning assigned to that expression by the *Canadian Security Intelligence Service Act*.

(2) Where the Minister and the Solicitor General are of the opinion, based on security or criminal intelligence reports received and considered by them, that a permanent resident is a person described in subparagraph 19(1)(c.2), subparagraph 19(1)(d)(ii), paragraph 19(1)(e), (f), (g), (k) or (l) or 27(1)(a.1), subparagraph 27(1)(a.3)(ii) or paragraph 27(1)(g) or (h), they may make a report to the Review Committee.

(3) The Minister and the Solicitor General of Canada shall, within ten days after a report referred to in subsection (2) is made, cause a notice to be sent informing the person who is the subject of the report that following an investigation in relation thereto, a deportation order may be made against that person.

(4) Where a report is made to the Review Committee under subsection (2), the Minister may cause to be filed with an immigration officer, a senior immigration officer or an adjudicator, as required for the purposes of this Act, a document stating that, in the opinion of the Minister and the Solicitor General of Canada, the person named in the document is a person described in paragraph 19(1)(e) (f), (g), (k) or (l) or 27(1)(a.1), subparagraph 27(1)(a.3)(ii) or paragraph 27(1)(g) or (h), as the case may be.

(5) Where a report is made to the Review Committee pursuant to subsection (2), the Review Committee shall investigate the grounds on which it is based and for that purpose subsections 39(2) and (3) and sections 43, 44 and 48 to 51 of the *Canadian Security Intelligence Service Act* apply, with such modifications as the circumstances require, to the investigation as if the investigation were conducted in relation to a complaint made pursuant to section 42 of that Act, except that

- (a) a reference in any of those provisions to “deputy head” shall be read as a reference to the Minister and the Solicitor General of Canada; and
- (b) paragraph 50(a) of that Act does not apply with respect to the person concerning whom the report is made.

(6) The Review Committee shall, as soon as practicable after a report is made to it pursuant to subsection (2), send to the person with respect to whom the report is made a statement summarizing such information available to it as will enable the person to be as fully informed as possible of circumstances giving rise to the report.

(7) [Repealed 1992, c. 49, s. 29.]

(8) Notwithstanding anything in this Act, where a report is made to the Review Committee pursuant to subsection (2), an inquiry under this Act concerning the person in respect of whom the report is made shall not be commenced or, if commenced, shall be adjourned until the Review Committee has, pursuant to subsection (9), made a report to the Governor in Council with respect to that person and the Governor in Council has made a decision in relation thereto.

(9) The Review Committee shall, on completion of an investigation in relation to a report made to it pursuant to subsection (2), make a report to the Governor in Council containing its conclusion whether or not a certificate should be issued under subsection 40(1) and the grounds on which that conclusion is based.

(10) The Review Committee shall, at the same time as or after a report is made pursuant to subsection (9), provide the person with respect to whom the report is made with a report containing the conclusion referred to in that subsection. 1976-77, c. 52, s. 39; 1984, c. 21, s. 80; R.S.C. 1985 (3d Supp.), c. 30, s. 6; R.S.C. 1985 (4th Supp.), c. 29, s. 2; 1992, c. 49, s. 29.



*Chiarelli v. Canada (Min. of Employment & Immigration)*, 16 Imm. L.R. (2d) 1, [1992] 1 S.C.R. 711.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of 5 years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to the SIRC. The report indicated that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of the SIRC and directed the appellant Minister to issue a certificate under section 82(1) with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

The SIRC conducted its investigation and hearing first by reading a document entitled "Statement of Circumstances" as well as two summaries of information. The first day's hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition imposed by section 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens

and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident's right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the Appeal Board's decision or substitute his decision as he deemed just and proper. The 1966 *White Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision as to whether to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable

balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

### **SECURITY CERTIFICATES — *Effect of certificates.***

40. (1) Where, after considering a report made by the Review Committee referred to in subsection 39(9), the Governor in Council is satisfied that the person with respect to whom the report was made is a person described in paragraph 19(1)(c.2), subparagraph 19(1)(d)(ii), paragraph 19(1)(e), (f), (g), (k) or (l) or 27(1)(a.1), subparagraph 27(1)(a.3)(ii) or paragraph 27(1)(g) or (h), the Governor in Council may direct the Minister to issue a certificate to that effect.

(2) A certificate issued under subsection (1) is, in any prosecution or other proceeding under or arising out of this Act, conclusive proof of the matters stated therein without proof of the signature or official character of the person appearing to have signed the certificate unless called into question by the Minister. 1976-77, c. 52, s. 40; 1984, c. 21, s. 80; R.S.C. 1985 (3d Supp.), c. 30, s. 7; R.S.C. 1985 (4th Supp.), c. 29, s. 3; 1992, c. 49, s. 30.

### ***Subsection (1)***

*Chiarelli v. Canada (Min. of Employment & Immigration)*, 16 Imm. L.R. (2d) 1, [1992] 1 S.C.R. 711.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of 5 years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to the SIRC. The report indicated that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of the SIRC and directed the appellant Minister to issue a certificate under section 82(1)



with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

The SIRC conducted its investigation and hearing first by reading a document entitled "Statement of Circumstances" as well as two summaries of information. The first day's hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition imposed by section 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident's right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the Appeal Board's decision or substitute his decision as he deemed just and proper. The 1966 *White Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident

on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision as to whether to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

***CERTIFICATE — Delay of inquiry — Reference to a Federal Court — Judicial consideration of certificate — Evidence — Information obtained in confidence from foreign governments — No appeal — Certificate is conclusive proof — Release of person named in certificate — Right to apply — Order for release — Hearing of application — Evidence.***

**40.1 (1)** Notwithstanding anything in this Act, where the Minister and the Solicitor General of Canada are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person, other than a Canadian citizen or permanent resident, is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii), they may sign and file a certificate to that effect with an immigration officer, a senior immigration officer or an adjudicator.

(2) Where a certificate is signed and filed in accordance with subsection (1),

(a) an inquiry under this Act concerning the person in respect of whom the certificate is filed shall not be commenced, or if commenced shall be adjourned, until the determination referred to in paragraph (4)(d) has been made; and

(b) a senior immigration officer or an adjudicator shall, notwithstanding section 23 or 103 but subject to subsection (7.1), detain or make an order to detain the person named in the certificate until the making of the determination.

(3) Where a certificate referred to in subsection (1) is filed in accordance with that subsection, the Minister shall

(a) forthwith cause a copy of the certificate to be referred to the Federal Court of Canada for a determination as to whether the certificate should be quashed; and

(b) within three days after the certificate has been filed, cause a notice to be sent to the person named in the certificate informing the person that a certificate under this section has been filed and that following a reference to the Federal Court of Canada a deportation order may be made against the person.

(4) Where a certificate is referred to the Federal Court of Canada pursuant to subsection (3), the Chief Justice of that Court or a judge of that Court designated by the Chief Justice for the purposes of this section shall

(a) examine within seven days, *in camera*, the security or criminal intelligence reports considered by the Minister and the Solicitor General and hear any other evidence or information that may be presented by or on behalf of those Ministers and may, on the request of the Minister or the Solicitor General, hear all or part of such evidence or information in the absence of the person named in the certificate and any counsel representing the person where, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that such disclosure would be injurious to national security or to the safety of persons;

(b) provide the person named in the certificate with a statement summarizing such information available to the Chief Justice or the designated judge, as the case may be, as will enable the person to be reasonably informed of the circumstances giving rise to the issue of the certificate, having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons;



- (c) provide the person named in the certificate with a reasonable opportunity to be heard;
- (d) determine whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available to the Chief Justice or the designated judge, as the case may be, and, if found not to be reasonable, quash the certificate; and
- (e) notify the Minister, the Solicitor General and the person named in the certificate of the determination made pursuant to paragraph (d).

(5) For the purposes of subsection (4), the Chief Justice or the designated judge may, subject to subsection (5.1), receive, accept and base the determination referred to in paragraph (4)(d) on such evidence or information as the Chief Justice or the designated judge sees fit, whether or not the evidence or information is or would be admissible in a court of law.

(5.1) For the purposes of subsection (4),

(a) the Minister or the Solicitor General of Canada may make an application, *in camera* and in the absence of the person named in the certificate and any counsel representing the person to the Chief Justice or the designated judge for the admission of information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof;

(b) the Chief Justice or the designated judge shall, *in camera* and in the absence of the person named in the certificate and any counsel representing the person,

(i) examine that information, and

(ii) provide counsel representing the Minister or the Solicitor General of Canada with a reasonable opportunity to be heard as to whether the information is relevant but should not be disclosed to the person named in the certificate on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) that information shall be returned to counsel representing the Minister or the Solicitor General of Canada and shall not be considered by the Chief Justice or the designated judge in making the determination referred to in paragraph (4)(d), if

(i) the Chief Justice or the designated judge determines

(A) that the information is not relevant, or

(B) that the information is relevant and should be summarized in the statement to be provided pursuant to paragraph (4)(b) to the person named in the certificate, or

(ii) the Minister or the Solicitor General of Canada withdraws the application; and

(d) if the Chief Justice or the designated judge determines that the information is relevant but should not be disclosed to the person named in the certificate on the grounds that the disclosure would be injurious to national security or to the safety of persons, the information shall not be summarized in the statement provided pursuant to paragraph (4)(d) to the person named in the certificate but may be considered by the Chief Justice or the designated judge in making the determination referred to in paragraph (4)(d).

(6) A determination under paragraph (4)(d) is not subject to appeal or review by any court.

(7) Where a certificate has been reviewed by the Federal Court pursuant to subsection (4) and has not been quashed pursuant to paragraph (4)(d),

(a) the certificate is conclusive proof that the person named in the certificate is a person described in subparagraph 19(1)(c.1)(ii), paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l) or subparagraph 19(2)(a.1)(ii); and

(b) the person named in the certificate shall, notwithstanding section 23 or 103 but subject to subsection (7.1), continue to be detained until the person is removed from Canada.

(7.1) The Minister may order the release of a person who is named in a certificate that is signed and filed in accordance with subsection (1) in order to permit the departure from Canada of the person, regardless of whether the Chief Justice or the designated judge has yet made the determination referred to in paragraph (4)(d).

(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days after the making of the removal order relating to that person, the person may apply to the Chief Justice of the Federal Court or to a judge of the Federal Court designated by the Chief Justice for the purposes of this section for an order under subsection (9).

(9) On an application referred to in subsection (8) the Chief Justice or the designated judge may, subject to such terms and conditions as the Chief Justice or designated judge deems appropriate, order that the person be released from detention if the Chief Justice or designated judge is satisfied that

(a) the person will not be removed from Canada within a reasonable time; and

(b) the person's release would not be injurious to national security or to the safety of persons.

(10) On the hearing of an application referred to in subsection (8), the Chief Justice or the designated judge shall

(a) examine, *in camera*, and in absence of the person making the application and any counsel representing that person, any evidence or information

presented to the Minister in relation to national security or the safety of persons;

(b) provide the person making the application with a statement summarizing the evidence or information available to the Chief Justice or designated judge in relation to national security or the safety of persons having regard to whether, in the opinion of the Chief Justice or the designated judge, as the case may be, the evidence or information should not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons; and

(c) provide the person making the application with a reasonable opportunity to be heard.

(11) For the purposes of subsection (10), the Chief Justice or the designated judge may receive and accept such evidence or information as the Chief Justice or the designated judge sees fit, whether or not such evidence or information is or would be admissible in a court of law. R.S.C. 1985 (4th Supp.), c. 29, s. 4; 1992, c. 49, s. 31.

#### *Subsection (4)*

*Re Farahi-Mahdavi* (1993), 19 Imm. L.R. (2d) 222, 63 F.T.R. 120.

Robab Farahi-Mahdavi entered Canada from the United States at the border near Vancouver. While preparing to fly to Toronto she was stopped and detained by immigration officials acting under a certificate issued under section 40.1(1) and (2) of the Immigration Act. The certificate stated that Ms. Mahdavi was a member of an inadmissible class described in section 19(1)(g).

The Court must determine whether on the basis of the evidence and information available, the certificate is reasonable when it identifies Ms. Mahdavi as a person who, there is reasonable grounds to believe, will engage in acts of violence that would or might endanger the lives or safety of persons in Canada, or is a member of or likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence (section 19(1)(g)).

As the person named in such a certificate is subject to mandatory detention, a higher standard of reasonableness should be applied in reviewing this type of administrative action. Actual membership in an organization described in section 19(1)(g) is not required. It is sufficient to meet the statutory requirement that the evidence show that there are reasonable grounds to believe that the person is a member of such an organization. The test is the one understood in *A.G. Can. v. Jolly*, [1975] F.C. 216, 54 D.L.R. (3d) 277, 7 N.R. 271 (Fed. C.A.). In this case the Court found the certificate to be reasonable.

*Editor's Note:* Although the sections in question have been amended, the principles in this case may still be applicable.



**Subsection (11)**

*Smith v. R.* (1991), 14 Imm. L.R. (2d) 57, 4 Admin. L.R. (2d) 97, 42 F.T.R. 81, [1991] 3 F.C. 3.

The applicants applied to be admitted to Canada as refugees. They were detained as possible security risks and then brought before an adjudicator who reviewed the circumstances of their detention and ordered that they were to be released. The Minister then issued a certificate pursuant to section 40.1 stating the opinion that the applicants were members of classes described in section 19(1)(f) and 19(1)(g) of the Immigration Act. The issuance of this certificate caused the adjudicator to order the applicants' detention. Once the certificate is issued, the Court is to determine whether the certificate is reasonable on the evidence and information provided to the judge. Until this determination is made, an inquiry into the refugee status of the applicant may not be commenced or, if already commenced, must be adjourned. The applicants were referred to in the proceedings as Joseph Smith and Sarah Smith which were pseudonyms. The Court concluded that the word "shall" in section 40.1(3)(b) was directory and not mandatory. Further, the Court ruled that compliance with the notice provision was not a pre-condition to the exercise by the Court of its review function under section 40.1(4) having concluded that the Court had jurisdiction to consider the reasonableness of the certificate. The Court concluded that section 40.1(4)(a) provided it with jurisdiction to proceed *ex parte* to extend the time to serve the applicants with notice of the proceedings. The Court ruled as well that section 40.1(4)(a) authorizes the Court to hear oral evidence *in camera*. The Court determined that the word "forthwith" as required by section 40.1(3)(a) meant "as soon as was reasonably possible in the circumstances". The Court found that in this particular case the reference to the Court was made forthwith in all circumstances.

Section 40.1(4) gives the Court sitting on review of the certificate discretion to determine whether any part of the information or evidence put before the Court should not be disclosed on the grounds that the disclosure would be injurious to national security or the safety of persons. The Court concluded that disclosure of the sealed file material would be injurious to national security. The Court noted that an "informed reader", that is, a person who is both knowledgeable regarding securities matters and is a member or associate of a group which constitutes a threat or potential threat to the security of Canada may at times by fitting pieces of apparently innocuous information into a general picture be in a position to arrive at damaging deductions regarding the investigation conducted by our security services. This damage could be an understanding of the duration, scope, intensity and degree of success of an investigation, the investigative techniques of CSIS, the typographic and teleprinter systems employed by CSIS, the internal security procedures, the nature and content of classified documents and the identity of personnel involved in the investigation. Applying this consideration to the case at bar, the Court concluded that certain information should not be made public.

On the ultimate issue, the Court determined that the word "reasonable" in section 40.1(4)(d) adopted a standard of reasonableness set out in *R. v. Secretary of State for the Home Department*, [1984] A.C. 74 (H.L.). There the Court said that in cases of restraint put by the executive upon the liberty of an individual the civil standard should be flexibly applied. It was not necessary to import the formula devised by judges for the guidance of juries in criminal cases. Liberty is at stake and that is a grave matter. The reviewing

Court must be satisfied that the facts which are required for the justification of the restraint do exist. The Court will require a high degree of probability which is appropriate to what is at stake. Applying that standard in this case, the Court concluded that it was not reasonable to issue a certificate. The certificate was quashed and the applicants were set free.

### ***EFFECT OF CERTIFICATE.***

**40.2 An adjudicator does not have jurisdiction to determine the constitutionality of sections 39 to 40.1. 1992, c. 49, s. 32.**

### **Claims to Canadian Citizenship**

#### ***WHERE CLAIM TO CANADIAN CITIZENSHIP AT INQUIRY — Application for certificate of citizenship.***

**41. (1) Where, at any time during an inquiry, the person who is the subject of the inquiry claims to be a Canadian citizen and the adjudicator presiding at the inquiry is not satisfied that the person is a Canadian citizen, the inquiry shall be continued and, if it is determined that, but for the person's claim that the person is a Canadian citizen, a removal order would be made against that person, the inquiry shall be adjourned.**

**(2) Where an inquiry in respect of a person is adjourned pursuant to subsection (1), that person's claim that he is a Canadian citizen shall be referred to such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of the *Citizenship Act* and that person shall forthwith make an application for a certificate of citizenship pursuant to subsection 12(1) of that Act. 1976-77, c. 52, s. 43; 1992, c. 49, s. 33.**

#### ***Subsection (1)***

*Min. of Employment & Immigration v. Tighe*, Imm. App. Bd., Montreal, Doc. No. M83-1128E, February 17, 1984.

The Minister appealed under section 73 of the Immigration Act. The adjudicator had decided that the respondent was not a person described in section 27(2)(e) of the Act. As a result of this finding the adjudicator did not make a removal order against the respondent or issue a departure notice to him. The respondent had claimed to be a Canadian citizen at the inquiry. This claim was not disposed of due to the adjudicator's decision that the respondent was not described in section 27(2)(e) of the Act. The Board ruled that it did not have the power to allow the Minister's appeal pursuant to section 75(2) of the Act because it could not make a removal order against the respondent. The removal order could not be made because the respondent's claim to Canadian citizenship had never been resolved in accordance with the provisions of the Act. Accordingly, the Minister's appeal was dismissed.

*Bonner v. Min. of Employment & Immigration* (1982), 133 D.L.R. (3d) 522, 41 N.R. 218 (Fed. C.A.).

During an inquiry the applicant claimed to be a Canadian citizen. Accordingly, the inquiry was adjourned and later resumed before a different adjudicator over the objection of the applicant. The Court held that this resumption of the inquiry, which was a breach of section 35(3) of the Regulations, was valid because section 44(2) contemplated the resumption of the inquiry before "any other adjudicator".

*Nicholson v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-434-80, September 17, 1980.

A deportation order was set aside where the adjudicator, after a claim of Canadian citizenship was made, failed to adjourn the inquiry pursuant to this subsection. The Court observed that while the applicant was entitled to withdraw the claim after it had been made, no such withdrawal had, in fact, occurred.

**WHERE CERTIFICATE OF CITIZENSHIP ISSUED — *Where inquiry resumed — Idem.***

42. (1) Where a certificate of citizenship is issued under section 12 of the *Citizenship Act* to a person who is the subject of an inquiry, the adjudicator who was presiding at the inquiry or any other adjudicator shall terminate the inquiry and let that person come into or remain in Canada, as the case may be.

(2) An inquiry that was adjourned pursuant to subsection 41(1) shall be resumed as soon as reasonably practicable, by the adjudicator who was presiding at the inquiry or by any other adjudicator, where

(a) the person who was the subject of the inquiry does not forthwith make an application for a certificate of citizenship pursuant to subsection 12(1) of the *Citizenship Act*;

(b) a certificate of citizenship is not issued under section 12 of the *Citizenship Act* to that person within six months from the day on which the inquiry was adjourned or within such greater period of time as the adjudicator considers appropriate in the circumstances; or

(c) the adjudicator who was presiding at the inquiry or any other adjudicator is notified by the Minister that it has been determined that a certificate of citizenship will not be issued to that person.

(3) Where an inquiry is resumed pursuant to subsection (2), the adjudicator shall make the removal order that would have been made but for the claim of the person who was the subject of the inquiry that the person was a Canadian citizen. 1976-77, c. 52, s. 44; 1992, c. 49, s. 34.



**Subsection (2)**

*Bonner v. Min. of Employment & Immigration* (1982), 133 D.L.R. (3d) 522, 41 N.R. 218 (Fed. C.A.).

During an inquiry, the applicant claimed to be a Canadian citizen. Accordingly, the inquiry was adjourned and later resumed before a different adjudicator over the objection of the applicant. The Court held that this resumption of the inquiry, which was a breach of section 35(3) of the Regulations, was valid because the wording of section 44(2) contemplated the resumption of the inquiry before “any other adjudicator”.

**Convention Refugee Claims****43. [Repealed 1992, c. 49, s. 35.]**

**REFUGEE CLAIM — Reference to senior immigration officer — Determination by adjudicator — *Idem* — Deemed single claim.**

**44. (1)** Any person who is in Canada, other than a person against whom a removal order has been made but not executed, unless an appeal from that order has been allowed, and who claims to be a Convention refugee may seek a determination of the claim by notifying an immigration officer.

**(2)** An immigration officer who is notified pursuant to subsection (1) shall forthwith refer the claim to a senior immigration officer.

**(3)** Where a person who is the subject of an inquiry claims in accordance with subsection (1) to be a Convention refugee, the adjudicator shall determine whether the person may be permitted to come into or remain in Canada, as the case may be, and shall take the appropriate action under subsection 32(1), (3) or (4) or section 32.1, as the case may be, in respect of the person.

**(4)** Where a claim to be a Convention refugee by a person who is the subject of an inquiry is referred to a senior immigration officer and the senior immigration officer determines, before the conclusion of the inquiry, that the person is not eligible to have the claim determined by the Refugee Division, the adjudicator shall take the appropriate action under section 32 in respect of the person.

**(5)** Where a person makes more than one claim to be a Convention refugee, those claims shall, for the purposes of this Act, be deemed to be a single claim. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 49, s. 35.

***DETERMINATION BY SENIOR IMMIGRATION OFFICER — Exception — Determination to be in writing — Burden of proof — Duty to provide information.***

45. (1) Where a person's claim to be a Convention refugee is referred to a senior immigration officer, the senior immigration officer shall

(a) subject to subsection (2), determine whether the person is eligible to have the claim determined by the Refugee Division; and

(b) if the person is the subject of a report under subsection 20(1) or 27(1) or (2) or has been arrested pursuant to subsection 103(2), take the appropriate action referred to in any of subsections 23(4) and (4.2) and 27(4) and (6) or section 28.

(2) Where a person referred to in subsection (1) is alleged to be a person described in paragraph 19(1)(c), subparagraph 19(1)(c.1)(i) or paragraph 19(1)(e), (f), (g), (j), (k) or (l), the senior immigration officer shall not make the determination referred to in paragraph (1)(a) until an adjudicator determines that the person is, or is not, a person described in any of those paragraphs.

(3) On making a determination under paragraph (1)(a), the senior immigration officer shall notify the person in writing of the determination and, where the person is determined not to be eligible to have a claim to be a Convention refugee referred to the Refugee Division, shall include in the notification the basis for the determination.

(4) The burden of proving that a person is eligible to have a claim to be a Convention refugee determined by the Refugee Division rests on the person.

(5) Every person who claims to be a Convention refugee shall truthfully provide such information as may be required by the senior immigration officer to whom the person's claim is referred for the purposes of determining whether the person is eligible to have the claim determined by the Refugee Division. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 49, s. 14.

46. [Repealed 1992, c. 49, s. 35.]

***ACCESS CRITERIA — Idem — Application may be suspended — Coming to Canada — Burden of proof — Last coming to Canada.***

46.01 (1) A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person

(a) has been recognized as a Convention refugee by a country, other than Canada, that is a country to which the person can be returned;

(b) came to Canada, directly or indirectly, from a country, other than a country of the person's nationality or, where the person has no country of

nationality, the country of the person's habitual residence, that is a prescribed country under paragraph 114(1)(s);

(c) has, since last coming into Canada, been determined

(i) by the Refugee Division not to be a Convention refugee or to have abandoned the claim, or

(ii) by a senior immigration officer not to be eligible to have the claim determined by the Refugee Division;

(d) has been determined under this Act or the regulations, to be a Convention refugee; or

(e) has been determined by an adjudicator to be

(i) a person described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada, or

(ii) a person described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under this Act.

(1.1) A person who claims to be a Convention Refugee on or after the day on which this subsection comes into force is not eligible to have the claim determined by the Refugee Division if

(a) the person had, before that day, claimed to be a Convention Refugee and the person was determined not to have a credible basis for the claim;

(b) the person was, before that day, issued a departure notice; and

(c) the person has not left Canada since the departure notice was issued.

(2) The Minister may, by order, suspend the application of paragraph (1)(b) for such period, or in respect of such classes of persons, as may be specified in the order.

(3) For the purposes of paragraph (1)(b),

(a) subject to any agreement entered into pursuant to section 108.1, a person who is in a country solely for the purpose of joining a connecting flight to Canada shall not be considered as coming to Canada from that country; and

(b) a person who comes to Canada from a country shall be considered as coming to Canada from that country whether or not the person was lawfully in that country.

(4) For the purposes of paragraph (1)(b), where a person who has come to Canada in a vehicle seeks to come into Canada without a valid and subsisting passport or travel document issued to that person and claims to be a Convention refugee, the burden of proving that the person has not come to Canada from the country in which the vehicle last embarked passengers rests on that person.



(5) A person who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(c), be considered as coming into Canada on that return. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 1, s. 73; 1992, c. 49, s. 36.

### *Subsection (1)*

*Nguyen v. Canada (Min. of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 165, 100 D.L.R. (4th) 151, 151 N.R. 69, 14 C.R.R. (2d) 146 (Fed. C.A.).

The applicant, who was a permanent resident, was seeking to quash a deportation order. The applicant had been found described in subparagraphs 27(1)(d)(i) and 27(1)(d)(ii). Further, when the applicant attempted to obtain refugee status, a representative of the Minister tendered into evidence a certificate signed by the Minister stating that the applicant constituted a danger to the public of Canada with the result that, under the legislation then in effect, the applicant was not able to claim refugee status. Legislation which purports to define conditions for eligibility to claim refugee status may violate the Charter only if those conditions have the effect of subjecting a group of claimants to discriminatory treatment within the meaning of section 15. To deny dangerous criminals the right, generally conceded to immigrants who flee persecution, is not a form of illegitimate discrimination.

The Minister does not need to be compelled to follow formal guidelines stating the factors that should be taken into account in forming his opinion. The Minister's opinion in respect of public danger is as reliable as that of a court.

Counsel challenged the scheme set up by the Minister for the issuance of a certificate and complained that it did not provide for an oral hearing nor did it contain any provision for judicial review. Those submissions did not have to be addressed. The Court was sitting in judicial review of the decision of a tribunal which did not have jurisdiction to examine whether the public danger certificate has been issued in accordance with the rules of natural justice. The mandate of the tribunal did not entitle it to look behind the certificate fully valid on its face. The decision to issue a certificate is subject to judicial review by the Court only and not by immigration officers. The Court observed that the procedure set up and followed, in this case, accorded the applicant a full opportunity to make his case.

The scheme of the Act, established by subparagraph 27(1)(d)(i), subsection 32(2) and subparagraph 46.01(1)(e)(ii), is constitutionally sound and the decisions made against the applicant did not infringe his rights guaranteed under the Charter.

*Bembenek v. Canada (Min. of Employment & Immigration)*, Decision of Adjudicator Carmen DeCarlo and Refugee Board Member Eric Lazo, April 22, 1991.

Section 46.01(1)(e)(ii) in itself fails to meet the requirements of section 7 of the Charter. It does not provide for an application of the principles of fundamental justice where an individual is denied the right to life, liberty or security of the person. It makes no provision for a review, judicial or otherwise, of a decision by the Ministry to issue a certificate. The various irregularities in the issuance of the certificate in this case demonstrate the need for procedures to be prescribed by law before section 46.01(1)(e)(ii) can be said to be constitutional. Furthermore, this section cannot be saved by section 1. No lawful justification of the violation of section 7 described in this subparagraph

was demonstrated at the inquiry. Accordingly, the impugned provision was not saved by section 1 of the Charter of Rights and Freedoms. Pursuant to the provisions of section 52, the adjudicator and Refugee Board member declined to give effect to the subparagraph in question and permitted the applicant to call evidence to demonstrate a credible basis for her claim to refugee status.

*Editor's Note:* The eligibility criteria have been amended, but the application of section 7 of the Charter of Rights and Freedoms to the Ministerial determination in paragraph (e) may still be important.

### ***Subsection (1.1)***

*Canada (Min. of Employment & Immigration) v. Abasi* (1993), 10 Admin. L.R. (2d) 94, 61 F.T.R. 254 (Fed. T.D.).

The respondent left Nigeria in 1986 and entered Canada with authorizations to study and work. His family joined him shortly after his arrival in Canada. The student and employment authorizations were extended from time to time. In January, 1989 while the authorizations to study and work were in force, Agbasi secured employment and was the subject of a section 27 report as a person who had engaged in employment contrary to the Act. In September, 1989 his application for a visa extension pending completion of his inquiry was denied. At the conclusion of the proceedings the original paragraph of the allegation dealing with the unauthorized employment was held to be unfounded. The respondent was found, however, because his visa had expired, to be a person in paragraph 27(2)(e) (an overstay) and a departure notice was issued against him.

The respondent attempted to enter the United States but was unable to obtain a visa. Consequently, he did not leave Canada and was reported under paragraph 27(2)(i). At the second inquiry the respondent claimed refugee status. At the credible-basis hearing it was decided that to deny the respondent access to the Refugee Division pursuant to section 46.01(1)(f) would be contrary to section 7 of the Charter. This decision was upheld. The respondent was found to have overstayed because of Immigration's refusal to extend his visa. Had the visa been extended pending the outcome of the first inquiry, no ground for issuing a removal order would have existed once the respondent was cleared of the original allegation. Under those circumstances it was found to be unfair to apply paragraph 46.01(1)(f). Accordingly that section was found to be of no force and effect so far as the respondent was concerned.

*Editor's Note:* While the legislative scheme has changed since this decision, the principles may have a more general application.

### ***RIGHT TO MAKE A CLAIM.***

**46.02 (1)** Where a senior immigration officer determines that a person is eligible to have a claim determined by the Refugee Division, the senior immigration officer shall forthwith refer the claim to the Refugee Division in the manner and form prescribed by rules made under subsection 65(1). R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 49, s. 37.

**REFERENCE OF CLAIM TO REFUGEE DIVISION — *Obligation to provide information.***

46.03 (1) Where a removal order is made against a person who has been determined not to be eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(b), but the person

- (a) cannot be removed from Canada to a country prescribed pursuant to paragraph 114(1)(s),
- (b) having been removed from Canada, is allowed to come into Canada pursuant to paragraph 14(1)(c), or
- (c) having been allowed to leave Canada voluntarily, has not been permitted entry to the country from which the person had come to Canada and is allowed to come to Canada pursuant to paragraph 14(1)(c),

a senior immigration officer shall forthwith refer the claim to the Refugee Division in the manner and form prescribed by rules made under subsection 65(1).

(2) A person whose claim is referred to the Refugee Division pursuant to section 46.02 or subsection (1) shall, in the manner and within the period prescribed by rules made under subsection 65(1), provide the Refugee Division with such information as is required by the rules. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 49, s. 37.

***Subsection (1)***

*Orelieu v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 592, 15 Imm. L.R. (2d) 1, 135 N.R. 50 (C.A.).

Canada's obligations in the area of refugees stem from the 4th Geneva Convention of August 12, 1949, and protocol due to the Geneva Convention of August 12, 1949, both approved by Acts of Parliament (Geneva Conventions Act, R.S.C. 1985, c. G-3, s. 2, as am. S.C. 1990, c. 14, s. 1), as well as a customary norm of temporary refuge. To return a person to Haiti in the circumstances that presently exist and have existed at relevant times in this case would have violated Canada's obligations under the Convention, the protocol and the customary norm of international law prohibiting the forceable repatriation of foreign nationals who have fled generalized violence and other threats to their lives and security arising out of internal armed conflict within their state of nationality. The Convention, the protocol and the customary norm of international law have the force of domestic law in Canada and can be enforced in the courts of Canada at the suit of a private individual. The intention to execute a deportation order which if executed would breach those laws does not colour the process under the Immigration Act by which a person from such a country may be ordered deported. This is not to denigrate the importance of the Convention, the protocol and the customary norms of international law. It would be a grave and justiciable matter if Canada were



to execute deportation orders in circumstances which breached obligations under international law and put the life, liberty or security of persons in peril.

***APPLICATION FOR LANDING — Grant of landing — Exception — Terms and conditions — Abandonment of application — Notice of decision — Deeming provision — No grant of landing.***

**46.04 (1)** Any person who is determined by the Refugee Division to be a Convention refugee may, within the prescribed period, apply to an immigration officer for landing of that person and any dependant of that person, unless the Convention refugee is

- (a) a permanent resident;
- (b) a person who has been recognized by any country, other than Canada, as a Convention refugee and who, if removed from Canada, would be allowed to return to that country;
- (c) a national or citizen of a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution; or
- (d) a person who has permanently resided in a country, other than the country that the person left, or outside of which the person remains, by reason of fear of persecution, and who, if removed from Canada, would be allowed to return to that country.

**(2)** [Repealed 1992, c. 49, s. 38.]

**(3)** Notwithstanding any other provision of this Act, but subject to subsections (3.1) and (8), an immigration officer to whom an application is made under subsection (1) shall grant landing to the applicant, and to any dependant for whom landing is sought if the immigration officer is satisfied that neither the applicant nor any of those dependants is a person described in paragraph 19(1)(c.1), (c.2), (d), (e), (f), (g), (j) (k), or (l) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

- (a) more than six months has been imposed; or
- (b) five years or more may be imposed.

**(3.1)** An immigration officer may grant landing under subsection (3) only if

- (a) the time normally limited for filing an application for leave to commence an application for judicial review under the *Federal Court Act* in respect of the Refugee Division's determination that the person is a Convention Refugee has elapsed without such an application having been filed; or
- (b) where the Minister has filed an application for leave to commence an application for judicial review under the *Federal Court Act* within the time

normally limited for doing so, a judgment is made in respect of the Refugee Division's determination by the Federal Court — Trial Division, Federal Court of Appeal or Supreme Court of Canada that finally disposes of the matter.

(4) An immigration officer who grants landing to an applicant pursuant to this section may impose terms and conditions of a prescribed nature in connection therewith.

(5) If an applicant under subsection (1) is, in the opinion of the immigration officer, in default in the prosecution of the application, the immigration officer may, after giving the applicant a reasonable opportunity to be heard, declare the application to have been abandoned.

(6) An immigration officer to whom an application is made under subsection (1) shall render the decision on the application as soon as possible and shall send a written notice of the decision to the applicant.

(7) Where a person who is determined to be a Convention refugee is a person against whom a removal order or conditional removal order is made is granted landing under this section, the order shall be deemed never to have been made.

(8) An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 1, s. 143, Sched. VI, item 12; 1992, c. 49, s. 38.

### *Subsection (1)*

*Chahoud v. Canada (Min. of Employment & Immigration)* (1992), 16 Imm. L.R. (2d) 108 (Fed. C.A.).

In order to obtain Convention refugee status claimants must establish that they are unable or unwilling to avail themselves of the protection of all their countries of nationality. Subsection 46.04(1)(c) has as a focal point the landing of refugee claimants rather than their status as Convention refugees and has no application in considering the refugee status of a person who is a national or citizen of a second non-persecuting country. The Court affirmed its decision in *Ward v. Canada (Min. of Employment & Immigration)* (1990), 108 N.R. 60 and *Canada (Min. of Employment & Immigration) v. Akl*, Fed. C.A., Doc. No. A-527-89, March 6, 1989.

### *Subsection (3)*

*Taei v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 187, 64 F.T.R. 311.

The applicant sought leave for a judicial review to obtain an order compelling the respondent to process his application for landing. The applicant arrived in Canada in

1989 and made a claim for refugee status. His claim was determined affirmatively but before landed-immigrant status was granted, the applicant was charged with aggravated assault, attempted murder and extortion and these charges were pending at the time of this application. The respondent had refused to process the application until the criminal charges were disposed of by the courts. Leave to institute judicial review was denied. The presumption of innocence requires the respondent to do nothing but stay the applicant's request for admission until the criminal charges are disposed of. It would be against public policy for the respondent to heedlessly grant permanent resident status until the criminal charges were completed. If the applicant is acquitted, then the respondent should proceed with granting admission. If the applicant is convicted, then he will have disqualified himself from landing.

**46.05 [Repealed 1992, c. 49, s. 39.]**

**46.06 [Repealed 1992, c. 49, s. 39.]**

***DIRECTION TO REOPEN INQUIRY — Determination of the right to remain in Canada — Determination of the right to remain in Canada — Where no right to remain in Canada — Where right to remain in Canada — Additional allegations — Inquiry.***

**46.07 (1)** Where any person against whom a removal order or conditional removal order is made by an adjudicator is determined by the Refugee Division to be a Convention refugee and

- (a) is a person described in paragraph 46.04(1)(a), (b), (c) or (d),
- (b) fails to apply for landing under section 46.04 within the time limited therefor,
- (c) is declared to have abandoned an application under section 46.04, or
- (d) withdraws an application for landing under section 46.04, or
- (e) is refused landing on an application under section 46.04,

a senior immigration officer shall cause the inquiry with respect to the person to be reopened by the adjudicator who presided at the inquiry or by any other adjudicator as soon as practicable.

(1.1) Subject to subsection (6), where any person against whom a removal order or conditional removal order is made by a senior immigration officer is determined by the Refugee Division to be a Convention refugee and the person is a person described in any of paragraphs (1)(a) to (e), a senior immigration officer shall determine whether or not the person has a right under subsection 4(2.1) to remain in Canada.

(2) Where an inquiry is reopened pursuant to this section, the adjudicator shall determine whether or not the person who is the subject of the inquiry has a right under subsection 4(2.1) to remain in Canada.

(3) Where a senior immigration officer or adjudicator determines that a



person does not have a right under subsection 4(2.1) to remain in Canada, the senior immigration officer or adjudicator shall

- (a) confirm the order made against that person; or
- (b) quash the order made against that person and take the appropriate action under subsection 23(4), paragraph 23(4.2)(a), subsection 27(4) or (6) or section 32 with respect to that person.

(4) Where a senior immigration officer or an adjudicator determines that a person has a right under subsection 4(2.1) to remain in Canada, the senior immigration officer or the adjudicator shall quash the removal order or conditional removal order and notwithstanding any other provision of this Act or the regulations, shall allow the person to remain in Canada.

(5) In making the determination referred to in subsection (1.1) or (2) and in taking the appropriate action under subsection 23(4), paragraph 23(4.2)(a), subsection 27(4) or (6) or section 32 with respect to a person, the senior immigration officer or adjudicator may take into consideration

- (a) any allegation respecting the person not previously made if that person is the subject of a report under paragraph 20(1)(a); or
- (b) where that person is not the subject of a report under paragraph 20(1)(a), any allegation that is set out in a report under subsection 27(1) or (2) if the Deputy Minister has issued a direction pursuant to subsection 27(3) that a determination be made with respect to the allegation.

(6) Where any additional allegation referred to in subsection (5) in respect of a person is not an allegation with respect to which a senior immigration officer may make a removal order, the senior immigration officer shall, as soon as is practicable, cause an inquiry to be held with respect to that person. R.S.C. 1985 (4th Supp.), c. 28, s. 14; 1992, c. 49, s. 40.

### Service of Orders

#### *SERVICE OF ORDERS.*

47. A removal order or conditional removal order or a copy thereof shall, in such manner as is prescribed, be served on the person against whom it is made and on such other persons as are prescribed. R.S.C. 1985 (4th Supp.), c. 28, s. 15.

*Re Morrison*, [1974] 2 F.C. 115, 47 D.L.R. (3d) 255 (Fed. C.A.).

Under the Immigration Act, R.S.C. 1970, a deportation order was valid if any one of the grounds upon which it was based was sufficient. In this case, however, the applicant's attack on the deportation order failed on all grounds.

*Ex parte Paterson* (1971), 3 C.C.C. (2d) 181, 18 D.L.R. (3d) 84 (B.C. S.C.).

On an application for a writ of *habeas corpus* without *certiorari* in aid to release an applicant who was in custody, the Court cannot go behind the deportation order.

*Rebrin v. Bird*, [1961] S.C.R. 376, 35 C.R. 412, 130 C.C.C. 55, 27 D.L.R. (2d) 622 (S.C.C.).

Under the Immigration Act, R.S.C. 1952, it was held that the deportation order was not defective for failure to specify the place to which the applicant was to be deported, provided the order was in prescribed form and there was statutory authority for the form and supporting regulations.

*Samejima v. R.*, [1932] S.C.R. 640, 58 C.C.C. 300, [1932] 4 D.L.R. 246 (S.C.C.).

An order made by a board of inquiry held under the Immigration Act, R.S.C. 1927, for the deportation of an alien was quashed by a court of competent jurisdiction for not being in accordance with the Act; the order could not be amended to comply with the Act since it was held there was nothing to amend.

### Execution of Orders

#### TIME OF EXECUTION.

**48. Subject to sections 49 and 50, a removal order shall be executed as soon as reasonably practicable. 1976-77, c. 52, s. 50.**

*Rambharose (Litigation Guardian of) v. R.*, Fed. T.D., Doc. No. T-167-93, April 14, 1994.

This was a motion for an order to stay the execution of a removal order issued against the plaintiff's litigation guardian (mother). The plaintiff was a Canadian born child whose parents came to Canada from Trinidad in 1988. The plaintiff's mother was the subject of a section 20 report for not having obtained an immigrant visa prior to appearing at a port of entry as required by section 9 of the Act. A subsequent humanitarian and compassionate grounds review was rejected. The mother then applied for Convention refugee status but was found not to have a credible basis for her claim and an exclusion order was issued against her. A second humanitarian and compassionate review was rejected. The plaintiff's father is still awaiting a decision on his humanitarian and compassionate review.

This action was commenced to prevent the Minister from removing the plaintiff's parents. The plaintiff, through a litigation guardian, argued that his rights under the Canadian Charter of Rights and Freedoms would be violated if his mother was removed from Canada and he was forced to either depart from Canada or be separated from his mother.

The Court found that the plaintiff would suffer irreparable harm as a result of being separated from his mother at such a tender age. Given the serious prejudice which the plaintiff would likely suffer if the removal order was executed, the balance of convenience favoured granting a stay.

*De Medeiros v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-7508-93, January 11, 1994.

The Court granted the stay of the execution of a deportation order until such time as it had rendered its decision in respect of an application for leave and for judicial review of a decision of the Appeal Division. On the issue of irreparable harm, the Court found that the Appeal Division had an ongoing and continuing equitable jurisdiction with respect to the applicant, which jurisdiction would cease to exist upon the applicant's departure from Canada. This cessation of the Appeal Division's equitable jurisdiction was held to constitute irreparable harm.

*Boquoi v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 232.

The applicant and his wife sought to stay departure notices requiring them to leave Canada for Germany before the end of September, 1993. The application failed because the applicants were unable to establish irreparable harm. The application for a stay contained affidavits swearing to the fact that the applicants had become very attached to the persons in their community and wished to prevent the separation of their two sons from the community which the sons knew as home. The youngest son was a Canadian citizen born in Prince Edward Island and further the applicants alleged that they had no home in Germany to go to and were fearful for their children's safety and security if they were required to return there. This was not a fear of persecution, but rather a fear of the stress and uncertainty of removal to Germany at this time. The applicants stated that prior to their arrival in Canada, there was no work available for them in Germany and that since their arrival they had managed to establish a home here and had been accepted and strongly supported by the community in Prince Edward Island, where they were living. Such factors did not establish irreparable harm. Mere economic dislocation or difficulties or inconvenience do not establish irreparable harm in circumstances where neither applicant has a right to remain in Canada.

*Da Costa v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 295, 64 F.T.R. 233.

This was an application for a stay of execution of a removal order. The application was filed on Friday June 4, 1993 and removal was scheduled for 7:30 a.m. Monday June 7, 1993. The request for a stay of the removal order was denied on the ground of delay by the applicant in bringing the application.

The removal order was issued on January 23, 1992. Before the end of that month the applicant married a Canadian citizen and assumed parental responsibility for a young child. The applicant received a "call in notice" from Immigration dated February 2, 1992 to attend an interview April 2, 1992. This interview, however, did not take place. Thus, the applicant was aware before his marriage of his precarious situation in Canada and did nothing to attempt to resolve his problem, except to continue to expand his family responsibilities. It was only when he was confronted with a specific date for his removal that he began to examine options open to him to prolong his stay or regularize his status.

The applicant had from January 23, 1992 more than an adequate opportunity to seek legal advice.

No risk to the applicant's life or safety was alleged if he were deported to Jamaica. It was acknowledged, however, that his wife and children would be substantially



prejudiced. His wife was expecting a third child and had been hospitalized from time to time because of the pregnancy and thus was disabled from working within or outside the home.

The Court concluded that the magnitude of the harm faced here derived in large part from the failure of the applicant to do anything in the interval since January 23, 1992 to mitigate the problem. It therefore did not rest easily with him to plead now for an extraordinary remedy. Accordingly, the request for a stay was dismissed.

*Bajwa v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-838-93, February 24, 1994.

The applicant applied for a stay of a deportation order, which was refused.

The granting of a stay of a deportation order is a discretionary matter. In that regard, the conduct of the applicant is a relevant consideration. The applicant's conduct in its total context is relevant. It is not merely a question of whether there has been an excessive delay.

The applicant voluntarily undertook expanded family responsibilities knowing there was an outstanding deportation order issued him. He had not even met his wife prior to the issuance of that order. He was married in February of 1993, but did not seek an H & C review until November of 1993 and, at the time he sought a stay of a deportation order, his wife was pregnant.

It was not appropriate for the Court to exercise its discretion to grant a stay because the applicant was now trying to rely on a situation in which he purposely placed himself.

*Grar v. Canada (Min. of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 301, 64 F.T.R. 6.

The fact that the applicant's removal from Canada before May 28, 1993 would mean that the applicant was not able to complete a three-year program of studies and receive a diploma, constituted irreparable harm. Deportation would mean that those studies would never be completed; if they were to be completed, it would only be after several years.

There would be no irreparable harm caused to the applicant if he were removed from Canada after the date that the studies were expected to be concluded (May 28) and for that reason the stay of execution of the deportation order was not to extend beyond May 28, when the applicant's studies were expected to be completed.

*Bal v. Canada (Min. of Employment & Immigration)*, [1993] 2 F.C. 199, 63 F.T.R. 226.

The applicant sought a stay of a removal order pending an application for leave to seek judicial review of a decision refusing special treatment on humanitarian and compassionate grounds. Sukhjinder Bal brought his two nephews to Canada because their natural father had received demands for money from members of the All Sikh Student Federation coupled with threats against the children's lives. Upon their entry into Canada the children's citizenship was not disclosed and the immigration officer wrongly assumed them to be their uncle's children. When the true citizenship of the two young children was discovered by Immigration, a conditional deportation order was obtained. The claim for refugee status on the children's behalf was dismissed. The uncle then petitioned for an order of the Supreme Court of British Columbia for an order

of adoption. When this was completed the uncle sponsored an application for permanent residence on behalf of the children and requested that the applications be processed from within Canada. This latter request was denied and it was that decision which the applicant sought to question.

Mr. Justice Noel had previously held that the Court did not have jurisdiction to issue a stay in the circumstances of this case. Other judges of the Court had expressed the opposite view. His Lordship was of the view that if he had jurisdiction to grant a stay he would have done so on the facts of this case. The Court determined that it was imperative that there be consistency in the manner in which fundamental issues of jurisdiction are dealt with by the Court. There was an open question as to the jurisdiction to grant relief. Accordingly, the Court determined that the uncertainty about the Court's jurisdiction should be resolved in favour of the party seeking the relief. To do otherwise would deprive a party of a remedy on the assumption that those members of the Court who have assumed the jurisdiction to grant the remedy were wrong. The Court was of the view that the contrary assumption should be made unless and until the Court of Appeal decides otherwise.

Accordingly, a stay in the execution of the removal orders was granted.

*Agyakwa v. Canada (Min. of Employment & Immigration)* (1993), 62 F.T.R. 118.

This was an application to stay the execution of a removal order. The applicant arrived in Canada from Ghana and made a claim for refugee status. While the applicant was in Canada he met and married a Canadian citizen. The marriage occurred before his refugee claim was dismissed. After getting married the applicant applied for landing from within Canada. The refugee claim was dismissed and the applicant was advised that there would be no recommendation that he be landed from within Canada because the immigration officer had serious reservations about whether the marriage was for immigration purposes.

The request for a stay was granted. Irreparable harm was found to be established, not only to the applicant, but to his family. Uncontradicted affidavit evidence established that the applicant's spouse had three children by a previous marriage and that the applicant had in effect become a father to those children. Further, the whole family was heavily dependent upon the applicant for support. The Court found more than personal inconvenience to the applicant at stake.

*Harper v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 233, 62 F.T.R. 96.

This was an application to stay a deportation order. The applicant claimed refugee status, which claim was found to have no credible basis. The applicant had applied for leave to review a decision finding sufficient humanitarian and compassionate grounds in the applicant's case to warrant a positive recommendation under section 114(2). In support of the application for a stay, the applicant's counsel filed an affidavit from his personal assistant. In the affidavit the personal assistant reiterated facts about the case that had been told to her by counsel for the applicant. There was no direct evidence from the applicant and no explanation as to why such direct evidence could not be provided. A stay application is in the nature of an interlocutory motion and an affidavit based on belief is acceptable. However, it will have little weight when it consists of hearsay upon hearsay. The courts can only make decisions on the basis of evidence. The affidavit of an employee in which the employee purports to truly believe certain facts of which

she has no personal knowledge, in circumstances where she has not even spoken to the person who would have such personal knowledge, is evidence of little probative value.

Information comes to the Court by way of evidence and counsel should ensure that they present evidence that the Court may rely upon with confidence. This is of heightened importance when motions are brought on short notice and the respondent has no practical opportunity to cross-examine on the affidavit or to present an affidavit in response.

One of the attachments to the legal assistant's affidavits was a nine-page letter from counsel to the manager of the Central Removals Unit in Mississauga, Ontario. She also referred to this letter during argument to establish some of the facts relating to the applicant. This raises the difficulty of counsel who was appearing before the Court relying on a letter that counsel has written to establish the truth about facts relating to the client. Evidence and submissions of counsel are not one and the same. Merely because counsel has written a letter containing information about the client and attached it to an affidavit, does not make it evidence of the truth of what is contained in it.

The application for a stay was refused.

*Petit v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 133 (Fed. T.D.).

The applicant arrived in Canada with her two children and claimed refugee status. She married her present husband while she was in Canada. A number of requests were made by the applicant after the date of her marriage for a determination of whether there were sufficient humanitarian and compassionate grounds to allow her to apply for landing from within Canada, on the ground that she was married to a Canadian citizen. On February 5, 1993 the applicant and her husband were asked to attend a marriage interview. On February 9, 1993 the applicant was notified that she would be required to leave Canada by February 26, 1993 and that there were insufficient humanitarian and compassionate grounds to justify allowing her to apply for landing from within Canada. It is in respect of that decision that leave to commence an application for judicial review was being sought. In those circumstances, section 18.2 of the Federal Court Act gave the Court jurisdiction to grant a stay.

On the question of whether the applicant would suffer irreparable harm, the Court noted that generally when a person is being returned to a country where there is no threat of physical danger or persecution, it would be hard to argue that irreparable harm exists. However, the Court noted that the applicant and her children found themselves in an "eleventh hour" situation created by the respondent. The applicant had written to the respondent on two or perhaps three occasions requesting a marriage interview. Had the interview been conducted in a timely manner, the applicant would have had an opportunity to test the validity of any decision made before being required to leave Canada. On the facts, the applicant had been called in for a marriage interview on the eve of deportation. She was told by the interviewer that "everything looked good". That decision was reversed by a supervisor with no explanation. The Court found that the execution of the removal order in those circumstances, before the applicant had an opportunity to obtain leave to challenge the decision, was unfair.

The Court does not look favourably upon applicants who appear at the last minute, before a removal order is to be executed, with a new spouse or with new requests for humanitarian and compassionate reviews. The position in which they put themselves in those circumstances is largely of their own making. In this case, the position in which



the applicant and her children found themselves was largely of the respondent's making and thus, it was appropriate to grant a stay of the removal order.

*Seegobin v. Canada (Min. of Employment & Immigration)* (1993), 59 F.T.R. 310 (Fed. T.D.).

The Court lacks jurisdiction to grant the stay of a deportation order in circumstances where its validity is not in dispute.

*Mahadeo v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-757, November 27, 1992.

This was an application for a stay of execution of a deportation order. The applicant, a native of Trinidad, arrived in Canada as a visitor and made a claim for refugee status. While the claim was pending, the applicant divorced her husband in Trinidad and married a man in Canada and gave birth to twin daughters who were approximately two years old at the time this application was heard.

In granting the stay the Court noted that the application for leave to seek judicial review was ready for consideration but had not been brought forward for the attention of a judge for some three months. The delay of the Court in dealing with the matter ought not to work to the disadvantage of the applicant. Irreparable harm to the applicant and her family, sufficient to warrant a stay, arose from the inevitable disruption of the family, if the stay were not granted. Finally, the granting of the stay did not seriously prejudice the respondent Minister in carrying out his obligations. If the application for leave was denied, any delay in the removal of the applicant would be of some short duration. If leave was granted, then the disruption of the applicant's family would have been avoided.

*Membreno-Garcia v. Canada (Min. of Employment & Immigration)*, 7 Admin. L.R. (2d) 38, 17 Imm. L.R. (2d) 291, 55 F.T.R. 104, [1992] 3 F.C. 306.

The applicant had applied for refugee status but a first-level tribunal found that there was no credible basis to the applicant's claim. The applicant applied for leave to commence an application for judicial review, which leave was granted. The applicant then sought a stay of the deportation order pending the outcome of the appeal.

In the present case, the deportation order flowed from and was underpinned by the decision finding no credible basis to the applicant's claim. If that decision was invalid then the deportation order was invalid. In such circumstances, a challenge has in fact been made to the validity of the deportation order.

In *Lodge v. Canada (Min. of Employment & Immigration)*, [1979] 1 F.C. 775 (C.A.), the Court stated the principle to be applied in deciding whether a permanent injunction should be granted to restrain a Minister of the Crown from performing his statutory duty. In *Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123 (Fed. C.A.), the Court held that it had jurisdiction to grant a stay in cases such as this one. Since that time the Trial Division's jurisdiction has been made clear by the addition of section 18.2 of the Federal Court Act.

The only requirement under section 18.2 is that the judge consider the interim order "appropriate". It may be that in the absence of at least an indirect attack on the deportation order the court would not consider a stay appropriate.

In determining when a stay order is "appropriate" the Court referred to the criteria

set out in *Toth*. Given that leave had been granted, the applicant clearly had an arguable case. On the basis of the applicant's affidavit evidence it would be hard to reach any other conclusion than that the applicant would suffer irreparable harm if he was returned to El Salvador. Insofar as the balance of convenience is concerned, the test set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, is not relevant. In that case, the validity of one section of the statute was under attack and thus an interlocutory injunction order in favour of one litigant impliedly would lead to similar orders respecting all individuals covered by the allegedly unconstitutional section in question. The section itself would in fact be rendered inoperative pending the determination of its validity. In the present case the legislative provisions of the statute were not challenged. One decision by an adjudicative body operating under the statute with respect to one specific individual was being challenged. Rendering an injunction or a stay order in such a case will not suspend the operation of any part of the legislation. Thus, the public interest considerations expressed in *Metropolitan Stores Ltd.* are not in issue.

When considering the balance of convenience in these types of cases the extent to which the granting of the stay might become a practice which thwarts the efficient operation of the immigration legislation is a valid consideration. The present procedures were put in place because a practice had grown up in which cases totally devoid of merit were initiated in court for the sole purpose of buying the applicants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which must be weighed against the potential harm to the applicant if a stay is not granted.

The situation here in this case is quite different from that which exists, for example, when applicants seek humanitarian and compassionate reviews on the eve of the execution of a deportation order and then argue that a stay should be granted because of the uncompleted nature of that review. Such a case is the type of situation in which there is a potential for creating a practice which undermines the orderly operation of the legislation.

Another significant factor in considering the balance of convenience test is the degree of delay which is incurred, if any, in prosecuting the applicant's appeal. Similarly, when the applicant knows of the decision which underlies the challenge to the deportation order and does not seek leave to commence a section 18 proceeding until the very last moment, there is reason to assume that the seeking of leave and the subsequent request for the staying of the deportation order are primarily time-buying manoeuvres.

In the present case, the balance of convenience was said to lie with the applicant and the stay was granted.

*Editor's Note:* Although the refugee procedures have changed, the principle stated herein may still be useful.

*Vaccarino v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-778, June 9, 1992.

The court is entitled on an application for a stay to take into consideration delay on the part of the applicant in seeking the injunction. The material filed in this case did not justify the applicant taking no steps to challenge or delay the execution of the departure notice until six days prior to her scheduled departure. The fact that the

adjudicator prior to issuing the departure notice did not comply with paragraph 36(1)(b) of the regulation and advise the applicant of her right to seek judicial review is a factor for consideration on her application for leave, but it is no justification for the applicant taking no steps whatever until the last moment to obtain legal advice on any possible ways to delay the execution of the departure notice.

*Khan v. Canada (Min. of Employment & Immigration)* (1992), 53 F.T.R. 158.

An earlier inquiry concerning the applicant's continuing presence in Canada was quashed by decision of the Court (*Khan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1282-89, July 28, 1989). The preliminary question was whether the application for a stay was properly before the Court in light of the decision in *Ontario Khalsa Darbar Inc. v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 179 (Fed. T.D.), which held that leave is required to bring an application for a stay in immigration proceedings pursuant to 82.1 of the Immigration Act. Previously, *Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123; 86 N.R. 302 (Fed. C.A.) acknowledged the inherent jurisdiction of the court to deal with an application for a stay in appropriate circumstances without the necessity of leave being applied for. Section 18.2 of the Federal Court Act, enforced since February 1, 1992, provided authority for the issuance of interim orders in relation to the matters before the Court and was sufficient to give jurisdiction to consider an application for a stay which in this case was interrelated with an application for leave to seek judicial review.

In this case there was no evidence of irreparable harm and the application for a stay was dismissed. The inquiry in question might result in a departure notice and, further, even if a deportation order were issued, removal would only occur after a pre-removal review. This review could result in a decision that there were humanitarian or compassionate considerations which justified permanent residence. Accordingly, the concerns of the applicant about the outcome of the inquiry were speculative and as such not evidence of irreparable harm.

*Hosein v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 125, 4 Admin. L.R. (2d) 162, 53 F.T.R. 86.

This was an application for an order staying an inquiry until the applicant's application for leave to commence judicial review proceedings was determined, and if leave be granted until those proceedings were finally disposed of by the Court. This application was accompanied by an application for leave pursuant to 82.1. The orders in question were sought in respect of a decision by a first-level tribunal to the effect that it would not hear evidence and argument in relation to section 7 of the Charter. The tribunal then proceeded to find the applicant did not have a credible basis for his claim to being a Convention refugee. The tribunal adjourned and then scheduled a resumption of its hearing. The application for leave to seek judicial review was not considered when this application for a stay was heard.

The Court's jurisdiction to order a stay of proceedings was not limited by section 18.2 of the Federal Court Act by the necessity to apply for leave to seek judicial review. In an appropriate case, particularly one where the issue raised in an application for leave is arguable but would be moot or the jurisdiction of the court would be rendered nugatory by failure to grant a stay, a stay may be ordered within the discretion of the court.

The Court was not persuaded that a stay of proceedings was required at the time



the application was heard. Further steps in the process of consideration of the applicant's situation were required before he would be excluded from Canada. The leave for judicial review now sought by the application could proceed in the ordinary course. If the leave application was not completed before steps were taken to remove the applicant, the applicant could apply for leave to stay implementation of those procedures at that time. The test for intervention is set out in the *Toth* case (*Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123, 86 N.R. 302 (Fed. C.A.).

It was determined that it was inappropriate at this stage to stay proceedings of the tribunal and the application was dismissed.

*Pavlov v. Canada (Min. of Employment & Immigration)*, 16 Imm. L.R. (2d) 105, [1992] 2 F.C. 289, 53 F.T.R. 253.

The requirements for issuing stays of deportation orders in the context of applications filed pursuant to section 82.1 seeking leave to commence a proceeding under section 18 of the Federal Court Act are as follows:

- I. the applicant must demonstrate that there is a serious question to be determined;
- II. that the applicant would suffer irreparable harm if the stay were not granted; and
- III. that as between the applicant and the respondent Minister the harm to the applicant would be greater if a stay were not granted than to the respondent if one were granted.

In the context of this particular case the application for stay was granted.

The Court in arriving at these requirements applied the decision of *Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123 (Fed. C.A.).

*Mathura (Litigation Guardian of) v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2571-91, January 13, 1992.

This application to stay the adjudication proceedings was refused. The stay which was sought hinged on a constitutional challenge to certain provisions of the Immigration Act and Regulations. Leave had not yet been granted to commence a proceeding based on those challenges. No challenge was made by the motion to the validity of the proceedings. Granting a stay in such circumstances would have set a precedent that could have had significant detrimental effects on the integrity of immigration proceedings. The Court ordered disposition of the application for leave within seven days so that the request for a stay may be determined after the decision to grant leave had been made.

*Bada v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 233, 56 F.T.R. 106 (Fed. T.D.).

The applicant sought to stay a deportation order. The deportation order itself is not an issue in the proceedings. The applicant was seeking to quash a decision that there were no humanitarian or compassionate grounds to allow the applicant to apply for landing from within Canada. The Court observed that whether the Trial Division had jurisdiction to grant a stay of deportation orders in circumstances where the orders themselves were not subject to attack, was an issue that should be taken to the Federal Court of Appeal. In this particular case the Court did not resolve the issue because it determined that there were not sufficient grounds to grant a stay in the event that the Court had jurisdiction to do so.

The Court observed that one factor which gave concern was that the applicant had

effectively been denied a determination of his leave application before the date for the execution of his deportation order because the respondent did not file the documentation respecting his case within the required time limits. These time limits had been extended because an Immigration officer was on vacation and the Court observed that this might not have been a proper basis for extending the time limits if the effect of the extension meant that the applicant would be removed from Canada before his application for leave was decided.

*Mashni v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 103 (Fed. T.D.).

The Court re-affirmed that *Cegarra v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-839, July 30, 1992 decided that a stay would inevitably be issued if the file was incomplete or otherwise not ready for adjudication in terms of the leave application. The Court noted that stay proceedings can always be avoided by a timely undertaking on the Minister's part in regard to the timing of removals. The Court noted that the Minister was not being asked to avoid his duty to remove an illegal immigrant, but only to see that those who wished to question the legality of removal have a proper opportunity to do so. Once the matter of leave is determined, further action may be possible. Those without leave will, of course, be forced to depart Canada. Those with leave may be compelled to leave Canada if they are destined for a country where and from which they can still instruct their solicitors.

*Cegarra v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 241.

Judges who decide immigration leave applications inevitably need the whole file including the tribunal's records so that the judge can determine whether the tribunal apparently went as badly off the rails as the applicant alleges. If the file raises an arguable case for judicial review, leave will be granted.

The applicant applied on July 30, 1992 for an eleventh-hour stay. The Court convoked a telephone hearing so that the respondent could be heard on July 30, before the applicant would have been removed from Canada. The removal order was made on June 9, 1992. The applicant's motion for leave was filed on June 16, 1992. The applicant was notified on July 14, 1992 that he was to be removed from Canada on Sunday August 2, 1992. The Court observed that it could have been determined on July 14, 1992 or shortly thereafter that the tribunal's record would not become available before the August 2 removal date.

The execution of a removal order will inevitably be stayed if the file is not complete and in the absence of the tribunal's record, it is not complete and the Court cannot properly determine the leave application. When the removal is scheduled for a time before that at which the Court and the respondent are prepared to address an already launched application for leave to commence proceedings, then pursuant to section 18.1 of the Federal Court Act the execution order will almost always be stayed.

Eleventh-hour emergency applications for a stay will result in a dilatory solicitor being personally ordered to pay the costs of the application. Whenever a client comes to consult a solicitor at the last moment the client's affidavit should make clear reference to that fact, lest the emergency be seen to be an unnecessary ploy or negligence on the solicitor's part. A solicitor who has acted for an applicant at the tribunal hearing can hardly ever assert tardy consultation by the client.

The Court noted in this case that counsel requesting the stay had only been retained at the last minute and was not responsible for the last-minute application.

*Duggal v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 20 (Fed. C.A.).

The Court of Appeal has no power to stay the execution of a removal order where it is deprived of jurisdiction by section 82.2(1) of the Immigration Act to entertain an appeal from a decision of the Trial Division. The power to stay can only be implied from the Court's power to hear an appeal. If such jurisdiction is denied, then the power to stay is absent. Not even the allegation that its Charter right is being violated can give the Court of Appeal a statutory jurisdiction to hear an appeal where Parliament has seen fit to withhold it.

*Thompson v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 67 (Fed. T.D.).

The applicant sought a stay of an exclusion order pending final disposition of the applicant's application for leave to seek judicial review. A credible-basis panel constituted under the previous legislation had determined that there was no credible-basis to the applicant's refugee claim. On the question of irreparable harm, the findings of the credible-basis tribunal are not conclusive because those findings are, at least in substantial part, matters raised by the applicant in his application for leave to seek judicial review. To accept those findings of credibility, the question of irreparable harm, as it is posed in the stay application, would amount to pre-judging the matter raised by the application for leave. The Court is therefore left with the applicant's claim as stated in his affidavits and therefore, for purposes of the stay application, the Court was prepared to find that the applicant would suffer irreparable harm if he were removed to Ghana before his application to seek judicial review had been considered and determined by the Court.

*Editor's Note:* Although decided under previous legislation, the principle enunciated in this case may have a broader implication.

*Nananso v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 234 (Fed. T.D.).

The applicant sought an interim order for prohibition pursuant to section 18 of the Federal Court Act, to prohibit his removal from Canada. The failure of the applicant to perfect his application for a stay in a timely manner did not deprive the Court of jurisdiction. There was no legitimate reason for the application being brought a mere two hours before the applicant's removal from Canada. The Court disapproved of the practice of bringing applications to stay deportation orders on an emergency basis and agreed with the proposition that the bringing of an application for a stay of a deportation order at the very last minute may constitute a sufficient basis for rejecting the application. No adequate explanation for the failure to perfect this application was forthcoming in the affidavit material and, therefore, the application was dismissed.

*Berhan v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 183 (Fed. T.D.).

The applicant sought a stay of a deportation order pending a decision by the



Immigration and Refugee Board on an application to re-open the claim to refugee status. Leave to review the decision denying refugee status had been sought and denied.

No decision on the application to re-open had been given prior to the date of this application, which was immediately before the date of the applicant's deportation.

No stay was granted because the Court did not have the authority to do so. Stays can be granted when the validity of a deportation order is itself being challenged. It is also arguable that stays can be given when there is a proceeding before the Court to which section 18.2 of the Federal Court Act applies. Neither situation pertained in this case and, accordingly, the Court did not have the authority to grant a stay.

*Osei v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2239-88, December 19, 1988.

In this case, the Court reviewed a variety of judicial pronouncements dealing with the Court's jurisdiction to stay an executive order in general or a deportation order in particular:

1. The Court noted that the Minister cannot be enjoined from executing a deportation order when the validity of the order has not been challenged;
2. The Federal Court of Appeal cannot, in the absence of statutory authorization to do so, stay the execution of an order that it has not pronounced, which it has no power to vary, and the validity of which is not challenged;
3. The Immigration Appeal Board has no jurisdiction to reconsider its decision confirming the deportation of a person and the only grounds for so doing is evidence of new facts; and
4. The Court distinguished the *Toth* case because the issue arose in that case, not out of a refugee status determination but, with respect to a removal order made against a permanent resident of Canada where a statutory right of appeal was provided. Further, the Court noted that, in the *Toth* case, the order itself was being challenged.

*Espinelli v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 21 (Fed. T.D.).

The applicant had been ordered deported. She then complained to the Human Rights Commission that the deportation proceedings violated the prohibition under the Canadian Human Rights Act against discrimination on the basis of marital status. The applicant sought a stay of the deportation order so that she could remain in Canada until her complaint was adjudicated upon. Her application was dismissed. While the Canadian Human Rights Act is a fundamental law, it does not clothe the Federal Court Trial Division with the power to stay a deportation order confirmed by the Immigration Appeal Board and maintained by the Federal Court of Appeal. Where the validity of the deportation is not itself an issue, the Trial Division has no jurisdiction under the Charter to paralyze an otherwise valid executory order.

*Wood v. Min. of Employment & Immigration* (1986), 2 F.T.R. 58 (Fed. T.D.).

The Minister can only defer the execution of a deportation order if the person who is to be deported is subject to a judicial order containing specific provisions that would be violated if the deportation order were to be executed. Accordingly, where the applicant was subject to a probation order, which contained no conditions compelling the presence of the applicant in Canada or his attendance in court at a specified time and place,

there was no obligation on the part of the Minister to defer his responsibility to execute the valid deportation order.

*Williams v. Canada (Min. of Employment & Immigration)*, [1985] 2 F.C. 153 (Fed. T.D.).

The applicant was born in Jamaica. She was unmarried and had five children, all of whom lived in Jamaica. The applicant arrived in Canada in September 1979 for a 3-week visit and has remained in Canada ever since. The applicant was informed by a lawyer in late 1983 that the long-term illegal migrants' programme did not apply to her because she had not been "underground" for 5 years. On May 29, 1984, the applicant was apprehended and a deportation order was made June 8, 1984. Judicial review of this order was dismissed in November 1984. The applicant's removal in December 1984 was deferred in order that the applicant's case could be reviewed to determine whether she then qualified under the long-term illegal migrants' programme. The applicant did not qualify under the programme. During the period when the applicant's case was being considered, the long-term illegal migrants' programme was modified in such a way that the applicant would have been eligible for the programme but for the fact of her apprehension. The application to restrain the applicant's removal was dismissed. Where a person has been lawfully ordered deported, and the procedure that he or she wishes to invoke is a purely discretionary one in the hope that he or she might be granted a Minister's permit to stay in Canada, any requirement of fairness in the exercise of the Minister's discretion is minimal. Such a case does not involve a benefit to which the applicant is legally entitled nor denial of any rights legally vested in the applicant. There was no denial of fairness because the applicant did not, albeit for different reasons, come within the old or new guidelines of the long-term illegal programme.

*Mercier v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-309-85, April 25, 1985, affirmed (1985), 62 N.R. 73 (Fed. C.A.).

On November 17, 1982, following an inquiry, a deportation order was issued against the applicant because he had been convicted of an offence for which a maximum term of imprisonment of 10 years or more may be imposed, pursuant to section 19(1)(c) of the Act. The applicant's appeal against this deportation order was dismissed on August 14, 1984. On January 30, 1985, the applicant tried to gain admission to the United States without success and returned to Canada with the intention of provoking an inquiry where he might claim refugee status. When the applicant reappeared at the Canadian border, a senior immigration officer issued a Summons to Appear at an inquiry, pursuant to section 23 of the Act. That decision was countermanded by another senior immigration officer and the applicant's case was withdrawn on the ground that the deportation order, issued against the applicant, had never been executed. It was this decision that was attacked by the applicant, who was seeking a writ of *mandamus* requiring the adjudicator to conduct his inquiry. The decision to countermand the Summons to Inquiry was part of the administrative process. The Court did not intervene because it was of the view that the applicant had not been treated unfairly and that to intervene and issue a writ of *mandamus* would create a situation in which the respondent Minister would, on the one hand, have to execute a deportation order against the applicant and, on the other hand, have to conduct an inquiry with a view to admitting the applicant to the country.

An appeal from this decision was heard on June 28, 1985, and dismissed. The

appellant (applicant) sought to raise, for the first time, the assertion that the deportation order had been executed by the appellant himself when he left the country for a 6-week visit to Haiti from May 12, 1984, to June 30, 1984. No consideration was given to the submission on appeal because it was a question which was raised for the first time before the Court of Appeal. It was founded upon an allegation of fact which was never put in issue before the Trial Division. The Court noted that when sitting an appeal of the Trial Division, it sat as a Court of Appeal whose function was to decide whether the issues presented at trial were properly disposed of. It was not the Court's duty to determine other issues which, had they been raised at the Trial Division, might have resulted in a different outcome if the necessary factual basis had been established.

*Farhan v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1313-84, August 14, 1984.

The applicant sought an injunction restraining the respondent from effecting her removal to her native Iraq. A deportation order had been made against the applicant. While the order was not attacked, the grounds for the injunction were that returning the applicant to her native land subjected her to cruel and unusual treatment contrary to the Canadian Charter of Rights. The applicant had, in Canada, what would be in Iraq an illicit or adulterous relationship and feared members of her family would physically harm her, even to the point of killing her, should she be returned. The Court assumed that it was proper to take into account the particular circumstances of the applicant in deciding the application and held that the evidence fell far short of establishing the applicant's position and, accordingly, the application was dismissed.

*Kee v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2776-83, March 9, 1984.

The applicant sought an order prohibiting the respondent from proceeding with the execution of a deportation order, pending the determination of the applicant's criminal conviction appeal and the application pursuant to section 115(2) of the Immigration Act for special consideration. Prohibition will not issue directing the Minister of Employment and Immigration to disobey a valid deportation order which he is under a statutory duty to carry out solely on the grounds that the applicant had not exhausted every legal remedy available to him.

*Persad v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-140-83, October 18, 1983.

In view of the provisions of sections 50, 51 and 52 of the Immigration Act, the Court was not prepared to import into the provisions of section 115(2) a power to suspend a deportation order pending a decision by the Governor in Council on the appellant's application under section 115(2).

*Re Gittens*, Fed. T.D., Doc. No. T-2944-82, May 26, 1982.

The applicant came to Canada in 1965 at the age of five. He became a permanent resident but not a Canadian citizen. A deportation order was made based on section 27(1)(d)(i) and (ii) of the Immigration Act. An appeal against the deportation order was dismissed by the Immigration Appeal Board and the Federal Court of Appeal refused leave to appeal the Immigration Appeal Board's decision. The applicant, at the time of the giving of judgment, had completed serving all of the sentences for his criminal



offences and was being kept in custody pending the execution of the deportation order. The application for an order quashing the deportation order against the applicant was dismissed because the Charter is not retrospective in its operation. The application for an order seeking the release of the applicant was denied on the basis that section 10 of the Charter stipulated that the validity of the detention was to be determined by the way of *habeas corpus* and the Court noted that it had no jurisdiction to grant *habeas corpus*. The Court did not express an opinion whether or not it had jurisdiction to grant *habeas corpus* with *certiorari* in aid, pursuant to the Charter. If execution *per se* of a valid deportation order would constitute an infringement or denial of an applicant's fundamental rights and freedoms, the Court had jurisdiction in the first instance to entertain an application for an appropriate remedy. Freedom of association as envisaged by section 2(d) of the Charter will not be violated by the execution of a deportation order. Execution of the order will sever immediate links with family, friends and others. To the extent that these are licit associations, they are social and familial. Assuming that they are the type of associations contemplated by section 2(d) of the Charter, they are subject to such reasonable limits prescribed by law as can demonstrably be justified in a free society. The reasonableness of the right of a free and democratic state to deport alien criminals was held to be self-evident and, therefore, demonstrably justified. Section 11(h) of the Charter was not violated because deportation was held not to be punishment for the offences, his conviction for which had rendered him liable to deportation in the first place. In this case, the probative value of the evidence of the conditions in Guyana was minimal. The Court accepted that economic conditions and prospects were not nearly as favourable to the individual there as in Canada and that the human rights of persons politically opposed to those in power were not, generally, respected by the Government of Guyana. The Court noted that neither the applicant nor his family had in any way been politically active so as to attract the attention of those in power in Guyana and that, therefore, the treatment the applicant could expect in Guyana would depend entirely upon his conduct there. Thus, the Court concluded that the evidence did not support the claim that execution of the deportation order would deprive the applicant of the right to life, liberty and security of the person afforded by section 7 and, therefore, the Court declined to grant relief.

Finally, the Court noted that the incidents of deportation, whatever their degree, do not render deportation a cruel and unusual treatment of an adult. As a norm, execution of a deportation order is not in the abstract rule an unusual treatment. The Court was not persuaded by the evidence that deportation of the applicant to Guyana would be cruel and unusual treatment in the context of this case. Accordingly, the application was dismissed.

*Min. of Employment & Immigration v. Hudnik*, [1980] 1 F.C. 180, 103 D.L.R. (3d) 308 (Fed. C.A.).

The Minister was not relieved of his duty under section 50 [s. 48] merely because, after being ordered deported, the respondent claimed Convention refugee status.

*Lodge v. Min. of Employment & Immigration*, [1979] 1 F.C. 775, 9 D.L.R. (3d) 326, 25 N.R. 437 (Fed. C.A.).

An application for an order enjoining the Minister from executing the removal order was denied since enforcement of the provisions of the Immigration Act was not a denial

of access to goods, services, facilities or accommodation customarily available to the general public. Further, the enforcement of the order was not in itself a discriminatory practice within the meaning of the Canadian Human Rights Act, S.C. 1976-77, c. 33.

*Pereira v. Min. of Manpower & Immigration* (1978), 21 O.R. (2d) 828 (Ont. C.A.).

The respondent Minister and various immigration officials were not found to be in contempt of court in attempting to execute the deportation order while an appeal of a dismissal of a *habeas corpus* application and an application for an injunction staying the deportation order were both pending. However, no attempt should have been made at that stage to execute the deportation order which was the subject matter of the *habeas corpus* and injunction applications. The reserved judgment ultimately went against the applicant and his appeal of that judgment was dismissed. The Court held that attempts to execute the deportation order at that stage could not constitute contempt of the Court of Appeal, which had pronounced judgment without ordering a stay of the effect thereof pending any further appeals by the applicant. Service of a Notice of Motion for leave to appeal to the Supreme Court of Canada and a Notice of Motion to the Supreme Court of Ontario for an injunction did not have the effect of staying the deportation order. In addition, the Court held that once the Notice of Motion for leave to appeal to the Supreme Court of Canada was abandoned, the applicant lacked the status to pursue his application to have the respondent Minister and various officials committed for contempt. Such a motion was a motion in the cause, and the cause was ended.

*Denis v. R.*, [1976] 1 F.C. 499 (Fed. C.A.).

The appellant appealed from an order dismissing an application for an interlocutory injunction to restrain the execution of a deportation order pending trial of her actions for a permanent injunction and damages. The Court did not decide whether, in a proper case, an injunction could be granted against the Minister of Manpower and Immigration, assuming that the necessary steps were taken to make him a party to the proceedings. The Court refused the injunction because the removal of the appellant would not be a direct and unavoidable result of the application of the law of Canada; rather it would be the result of the decision of the appellant's mother as to whether to take her with her or leave her in Canada.

*Louie Yuet Sun v. A.G. Can.*, [1961] S.C.R. 70, 26 D.L.R. (2d) 63 (S.C.C.).

A removal order will not be quashed because the applicant is the mother of a child who is a natural born Canadian citizen and has a right to live in Canada.

### **STAY OF EXECUTION — Exception — *Idem*.**

**49. (1) Subject to subsection (1.1), the execution of a removal order made against a person is stayed**

**(a) in any case where the person against whom the order was made has a right of appeal to the Appeal Division, at the request of that person until the time provided for the filing of the appeal has elapsed;**

**(b) in any case where an appeal from the order has been filed with the Appeal Division, until the appeal has been heard and disposed of or has been declared by the Appeal Division to be abandoned;**

(c) subject to paragraphs (d) and (f), in any case where a person has been determined by the Refugee Division not to be a Convention refugee or a person's appeal from the order has been dismissed by the Appeal Division,

(i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the *Federal Court Act* or signifies in writing to an immigration officer an intention to file such an application, until the application for leave has been heard and disposed of or the time normally limited for filing an application for leave has elapsed and, where leave is granted, until the judicial review proceeding has been heard and disposed of,

(ii) in any case where the person has filed with the Federal Court of Appeal an appeal of a decision of the Federal Court — Trial Division where a judge of that Court has at the time of rendering judgment certified in accordance with subsection 83(1) that a serious question of general importance was involved and has stated that question, or signifies in writing to an immigration officer an intention to file a notice of appeal to commence such an appeal, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be, and

(iii) in any case where the person files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of Appeal on an appeal referred to in subparagraph (ii) to the Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be;

(d) in any case where a person who has claimed to be a Convention refugee or whose appeal has been dismissed by the Appeal Division has been determined by an adjudicator to be a person described in paragraph 19(1)(c), (c.1), (c.2), (d), (e), (f), (g), (j), (k) or (l), 19(2)(a), (a.1) or (b), 27(1)(a), (a.1), (a.2), (a.3), (d), (g) or (h) or 27(2)(d), until seven days have elapsed from the time the order was made or became effective, whichever is later, unless the person agrees that the removal order may be executed before the expiration of that seven day period;

(e) in any case where a person has been determined to be not eligible to have a claim to be a Convention refugee referred to the Refugee Division, until seven days have elapsed from the time the order was made or became effective, whichever is later, unless the person agrees that the removal order may be executed before the expiration of that seven day period; and

(f) in any case where a person has been determined pursuant to subsection 69.1(9.1) not to have a credible basis for the claim to be a Convention refugee,



until seven days have elapsed from the time the order became effective, unless the person agrees that the removal order may be executed before the expiration of that seven day period.

(1.1) Subsection (1) does not apply to

(a) a person residing or sojourning in the United States or St. Pierre and Miquelon who is the subject of a report made pursuant to paragraph 20(1)(a); or

(b) a person who has been determined to be not eligible to make a claim to be a Convention refugee by reason of paragraph 46.01(1)(b) and who is to be removed to a country with which the Minister has entered into an agreement under section 108.1 for sharing the responsibility for examining refugee claims.

(2) A reopening of an inquiry pursuant to section 35 stays the execution of a removal order pending the decision of the adjudicator. 1976-77, c. 52, s. 51; R.S.C. 1985 (4th Supp.), c. 28, s. 16; 1990, c. 8, s. 52; 1992, c. 49, s. 41.

### *Subsection (1)*

*Hamilton v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 255, 36 F.T.R. 167, [1991] 1 F.C. 3 (Fed. T.D.).

The applicant sought a stay of the execution of a deportation order which had been issued against her. The stay was sought pending resolution of proceedings which the applicant initiated under section 18 of the Federal Court Act. The applicant was challenging the validity of the Minister's refusal to recommend that she be granted an exemption, on compassionate and humanitarian grounds, from certain requirements of the Immigration Act. The applicant filed an application for leave coincident with filing the application for a stay.

The respondent Minister had consented to delay execution of the deportation order until a decision was rendered by the Court on the applicant's present application. The Court assumed jurisdiction to issue a stay even though the validity of the deportation order was not directly an issue.

The Court distinguished the case of *Lodge v. M.E.I.*, [1971] 1 F.C. 775 because, in that case, the injunction, if granted, would have been final in nature and was not an interlocutory order. Where a permanent injunction is sought, the validity of the deportation order itself must be questioned in the proceedings before the Court can have jurisdiction to issue a stay. Where the application for a stay is connected to a proceeding pending before the Court, different considerations apply. Granting a stay is always a discretionary remedy. If special and compelling circumstances can be shown to exist, a stay can be granted in the absence of leave having been given to commence the proceeding. One of the main issues to be decided in considering whether to grant a stay is whether a serious question to be tried exists and where such an issue is not resolved in favour of the applicant a stay will not be granted.

*Marwin v. Canada (Min. of Employment & Immigration)* (1989), 38 Admin. L.R. 298, 9 Imm. L.R. (2d) 122, 93 N.S.R. (2d) 120, 242 A.P.R. 120 (T.D.).

This was an application in the Supreme Court of Nova Scotia for an injunction to stay the implementation of a deportation order until the final disposition of the applicant's intended section 28 application. The applicant moved in the Provincial Supreme Court because the Federal Court Act contained, in the applicant's view, no provision for a stay of proceedings while an appeal was pending.

The saving provision of section 54 of the Immigration Act did not assist the applicant on the facts of this case. The applicant satisfied the Court that sufficient grounds existed for the review of the decision of the adjudicator. On the question of jurisdiction, the Court accepted the proposition that provincial superior courts have jurisdiction to hear a matter concerning a federal tribunal and the actions of federal officials when a constitutional violation or unconstitutional behaviour is being alleged.

The suggested constitutional violation, in this case, was a conflict between the appeal provisions and the equality provisions in section 15 of the Charter. Specifically, the inequality was found in the fact that certain classes of persons (to none of which the applicant belongs) have a right of appeal and a related right to have the deportations order stayed pending the appeal. Persons, like the applicant, who must resort to the Federal Court Act (sections 18 or 28) have no right to such a stay. The requested injunction was granted.

*Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123, 86 N.R. 302 (Fed. C.A.).

This was an application for an order staying the execution of a deportation order. The application failed to apply in a timely way for leave to appeal from the Immigration Appeal Board's decision. Therefore, section 51(1)(c) did not operate to stay the deportation order. An application for an extension of time within which to apply for leave to appeal is not encompassed by the words employed in section 51(1)(c).

The Court has an implied jurisdiction to grant a stay. Such an order will only be granted where the applicant demonstrates that:

1. He has raised a serious issue to be tried;
2. He would suffer irreparable harm if no order was granted; and
3. The balance of convenience considering the total situation of both parties favours the order. The balance of convenience test requires that the Court give equal consideration to the fact that the injunction is being sought against a public authority exercising a statutory power.

*Espinelli v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 21 (Fed. T.D.).

The applicant had been ordered deported. She then complained to the Human Rights Commission that the deportation proceedings violated the prohibition under the Canadian Human Rights Act against discrimination on the basis of marital status. The applicant sought a stay of the deportation order so that she could remain in Canada until her complaint had been adjudicated upon. Her application was dismissed. While the Canadian Human Rights Act is a fundamental law, it does not clothe the Federal Court Trial Division with the power to stay a deportation order confirmed by the Immigration Appeal Board

and maintained by the Federal Court or Appeal. Where the validity of the deportation is not itself an issue, the Trial Division had no jurisdiction under the Charter to paralyze an otherwise valid executory order.

***EXECUTION STAYED WHERE OTHER PROCEEDINGS — Not to be executed until after sentence completed.***

**50. (1) A removal order shall not be executed where**

**(a) the execution of the order would directly result in a contravention of any other order made by any judicial body or officer in Canada; or**

**(b) the presence in Canada of the person against whom the order was made is required in any criminal proceedings and the Minister stays the execution of the order pending the completion of those proceedings.**

**(2) A removal order that has been made against a person who was, at the time it was made, an inmate of a penitentiary, jail, reformatory or prison or becomes an inmate of such an institution before the order is executed shall not be executed until the person has completed the sentence or term of imprisonment imposed or as reduced by a statute or other law or by an act of clemency. 1976-77, c. 52, s. 52.**

***Subsection (1)***

*Mobtagha v. Canada (Min. of Employment & Immigration)* (1992), 53 F.T.R. 249.

The applicant applied to stay the execution of a deportation order. The applicant was found not guilty of all criminal charges on account of insanity and placed in custody in Douglas Hospital in Quebec pursuant to an order of the Lieutenant Governor. The deportation order was not in contravention of an order made by a judicial body. An order made by a Lieutenant Governor of the province of Quebec is not an order made by a judicial body or officer in Canada as provided in section 50. Accordingly, the execution of the deportation order was not prohibited by the Court.

*Sharoni v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1002-88, November 30, 1988.

This application for an order of *mandamus* directing the respondent Minister to issue a work authorization pursuant to sections 20(5)(a) and 19(4)(k)(v) of the Regulation was dismissed. Mr. Sharoni arrived at a Toronto immigration office on May 17, 1988. He indicated that he had been in Canada illegally since 1985 and intended to pursue a claim for refugee status. On May 20, 1988, the applicant returned to the immigration office and asked for a work permit. He indicated that he had been charged with a criminal offence and was released on a recognizance. It was his submission that he had thereby become a person whose presence was required in a criminal proceeding. Section 19(4)(k)(v) of the Regulation did not benefit the applicant because it was confined to those whose presence was required as a witness in criminal proceedings.



*Wood v. Min. of Employment & Immigration* (1986), 2 F.T.R. 58 (Fed. T.D.).

The Minister can defer the execution of a deportation order only if the person who is to be deported is subject to a judicial order containing specific provisions that would be violated if the deportation order were to be executed. Accordingly, where the applicant was subject to a probation order, which contained no conditions compelling the presence of the applicant in Canada or his attendance in court at a specified time and place, there was no obligation on the part of the Minister to defer his responsibility to execute the valid deportation order.

*Kee v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2776-83, March 9, 1984.

The applicant sought an order prohibiting the respondent from proceeding with the execution of a deportation order, pending the determination of the applicant's criminal conviction appeal and the application pursuant to section 115(2) of the Immigration Act for special consideration. Prohibition will not issue directing the Minister of Employment and Immigration to disobey a valid deportation order which he is under a statutory duty to carry out solely on the grounds that the applicant has not exhausted every legal remedy available to him.

*Williams v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1011-83, October 28, 1983.

An interim release order executed by a duly constituted provincial court judge requiring the applicant to appear in court on a specified date is an order within section 52(1)(a) and prohibition will issue to prevent the deportation of the applicant.

### ***Subsection (2)***

*Kee v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2776-83, March 9, 1984.

For digest, see section 50, subheading *Subsection (1), supra*.

### **VALIDITY NOT AFFECTED BY LAPSE OF TIME.**

**51. No removal order becomes invalid by reason of any lapse of time between its making and execution. 1976-77, c. 52, s. 53.**

### ***VOLUNTARY DEPARTURE — Place to which removed — Idem — Idem.***

**52. (1) Unless otherwise directed by the Minister, a person against whom an exclusion order or a deportation order is made may be allowed to leave Canada voluntarily and to select the country for which that person wishes to depart.**

**(2) Where a person is not allowed to leave Canada voluntarily and to select the country for which he wishes to depart pursuant to subsection (1), that person shall, subject to subsection (3), be removed from Canada to**

**(a) the country from which that person came to Canada;**

- (b) the country in which that person last permanently resided before he came to Canada;
- (c) the country of which that person is a national or citizen; or
- (d) the country of that person's birth.

(3) Where a person is to be removed from Canada and no country referred to in subsection (2) is willing to receive him, the person, with the approval of the Minister, or the Minister, may select any other country that is willing to receive that person within a reasonable time as the country to which that person shall be removed.

(4) Notwithstanding subsections (1) and (2), where a removal order is made against a person described in paragraph 19(1)(j), the person shall be removed from Canada to a country selected by the Minister that is willing to receive the person. 1976-77, c. 52, s. 54; R.S.C. 1985 (3d Supp.), c. 30, s. 7; 1992, c. 49, s. 42.

### *Subsection (1)*

*Bhawan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1239-87, June 22, 1987.

The applicant sought prohibition to prevent his removal from Canada pursuant to a deportation order dated January 5, 1984. The applicant came to Canada from Fiji as a landed immigrant. He became subject to a deportation order on January 5, 1984 and filed an appeal to the Immigration Appeal Board. While the appeal was pending, the applicant voluntarily returned to Fiji, and, in April 1986, the applicant came back to Canada. Prior to his return to Canada, the applicant's solicitor withdrew the appeal to the Immigration Appeal Board. The applicant's contention that the deportation was carried out by his leaving Canada for Fiji was rejected. The applicant could only leave Canada and select the country of destination with authorization from the Minister, and this was lacking in this case. Accordingly, the applicant had not complied with section 54 and the deportation order, dated January 5, 1984, could be executed to cause the applicant's removal from Canada.

*Mensinger v. Canada (Min. of Employment & Immigration)*, [1987] 1 F.C. 59, 24 C.R.R. 360, 5 F.T.R. 64 (Fed. T.D.).

A motion was made by the applicant for an order in the nature of *certiorari* quashing the decision of the Minister and his delegate directing the deportation of the applicant to the United States. Further, the applicant sought an order for a *mandamus* directing the Minister to provide the applicant with an opportunity to make submissions, prior to exercising his discretion, pursuant to section 54(1) and (2), and to provide reasons for the exercise of such discretion. In addition, an order was requested directing the respondents to permit the applicant to leave Canada voluntarily for Great Britain, and, finally, a writ of prohibition was requested to prevent the respondents from removing the applicant to the United States.

The applicant, a citizen of both the United States and Great Britain, entered Canada at Port Francis on April 10, 1986. He was arrested by the Port Francis police when

they discovered that the applicant had outstanding warrants for his arrest in the United States. The applicant had failed to appear for sentencing in Pecos, Texas on a narcotics charge and failed to appear for trial in Berlin County, Michigan. The applicant had an airplane ticket to England and a British passport, but the Acting Director General for Ontario, as the Minister's delegate, refused, under section 54, to allow the applicant to leave Canada voluntarily and return to Great Britain and directed that the applicant be deported to the United States. *mandamus* did not lie compelling the respondents to permit the applicant to depart for Great Britain.

There are four requirements for the issue of a writ of *mandamus*:

1. There must be a legal right to performance of the duty by the statutory authority;
2. There must be proof that performance of the duty is due because the Court will not enforce a future obligation;
3. The function must be such that there is no discretion in the decision-maker to perform the duty; and
4. There must be a prior demand that the duty be performed and a refusal to do so.

Pursuant to section 54, the only obligation imposed on the Minister is to make a decision whether the applicant should be allowed to leave Canada voluntarily and depart for Great Britain. *Mandamus* cannot then be used to order the Minister, having performed his duty, to exercise the discretion afforded to him by this section in a certain way. Prohibition was refused because there is no stay or removal guaranteed, either in law or by operation of the Immigration Act, where there are applications under section 18 or 28 of the Federal Court pending. Relief was further denied because the applicant was unable to show that the deportation proceedings were a form of disguised extradition. The onus of such proof was on the applicant. There were reasonable grounds for the Port Francis police to arrest the applicant. The United States authorities were not involved at any stage in the decision to arrest. There was no evidence that the Minister's decision was influenced by or based upon any form of agreement between Canada and the United States. There were no arrangements with the United States police for the return of the applicant and no request was ever made by the United States police or immigration authorities for the return of the applicant. With respect to the failure to give reasons, there is no general rule of law that reasons must be given for administrative decisions, and, in particular, there was no duty incumbent on the Minister in this case to provide reasons for his decision. It is the facts, the circumstances and the nature of the decision being made that will determine whether a decision-maker is required to give reasons in order to comply with the principles of fairness.

*Mercier v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1512-85, November 17, 1986.

The applicant was admitted to Canada in 1974. Between 1978 and 1984 he was convicted of a number of criminal offences. During this period, on November 17, 1982, he was ordered deported. The applicant returned to his country of origin between May 12 and June 30, 1984. The applicant sought a declaration that the deportation order made against him had ceased to be valid by virtue of section 54 of the Immigration Act. It was held that the voluntary departure of someone who is the subject of a deportation order could only be made under section 54 with leave of the Minister. In the absence



of such leave, the applicant could not be said to have carried out the removal order himself.

*Cole v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1994-80, October 9, 1980.

The right under section 54(1) is available only to those permitted to leave Canada voluntarily; it was held not to extend to the plaintiff, who had been ordered deported and lacked permission to leave voluntarily.

*Re Ramkissoon and Min. of Manpower & Immigration*, [1978] 2 F.C. 290, 82 D.L.R. (3d) 406, 20 N.R. 361 (Fed. C.A.), leave to appeal to S.C.C. refused 20 N.R. 445n (S.C.C.).

Under the Immigration Act, R.S.C. 1970, a deportation order was considered executed when the person ordered deported was removed from Canada either voluntarily or involuntarily.

### ***Subsection (2)***

*Hoang v. Canada (Min. of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35, 120 N.R. 193 (Fed. C.A.).

The appellant was ordered deported because he was a permanent resident who had been convicted of an offence for which a term of imprisonment of more than 6 months had been imposed; he had also been convicted of an offence for which the maximum term was 5 years or greater. The appellant had come to Canada as a stateless person from Vietnam and had been determined by the Minister in 1986 to be a convention refugee. The Court noted that the Immigration Appeal Board (which had decided this matter) correctly determined that its jurisdiction is only over whether a person should be removed from Canada and not as to the country of removal. Until the issue of deportation is settled, the Minister cannot make a decision as to the country of removal. Thus a statement by the Minister's representative as to the Minister's disposition to deport the appellant to Vietnam was not taken as a formal expression of the Minister's decision since the Minister was not, at the date of that statement, empowered to make the decision.

The Court determined that in dealing with the "double jeopardy" provisions of section 11(h) of the Charter deportation was not to be seen as a punishment of the person deported but a protection of those who remained. Further, deportation for serious offences affects neither section 7 nor section 12 of the Charter of Rights since it is not to be conceptualized as either a deprivation of liberty or a punishment. Finally, the Court noted that with respect to Canada's international obligations the United Nations convention relating to the status of refugees contained an exception to the prohibition against refoulement where the deportee had been convicted in the country where he was making the refugee claim of a particularly serious crime. The Court noted that the phrase "particularly serious crime" and "danger to the community" were not defined in the convention and therefore presumed that Parliament responsibly fulfilled its obligation when it enacted the Immigration Act.

Accordingly the appellant's appeal was dismissed.

*Mensing v. Canada (Min. of Employment & Immigration)*, [1987] 1 F.C. 59, 24 C.R.R. 360, 5 F.T.R. 64 (Fed. T.D.).

For digest, see section 52, subheading *Subsection (1), supra*.

*Moore v. Min. of Manpower & Immigration*, [1968] S.C.R. 839, 69 D.L.R. (2d) 273 (S.C.C.).

Under the Immigration Act, R.S.C. 1952, the power to specify a destination and the mode of exercise of the power did not give rise to a question of law reviewable by the Supreme Court of Canada. In this case the Supreme Court held, *inter alia*, that it was not necessary for the deportation order made under that Act to specify the destination to which the appellant was to be deported.

### RETURN TO CANADA.

**52.1** Where a removal order, other than a removal order that may be appealed to the Appeal Division, has been made against a person and the person is removed from or otherwise leaves Canada, the person may, at the expense of the Minister, return to Canada, if the person is subsequently successful in having the removal order set aside. R.S.C. 1985 (4th Supp.), c. 28, s. 17.

### PROHIBITED REMOVAL — *Idem*.

**53.** (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

- (a) the person is a member of an inadmissible class described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada; or
- (b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada.

(2) Notwithstanding subsections 52(2) and (3), no person who has been determined not to be eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(b) shall be removed from Canada to any country other than the country from which the person came to Canada as determined for the purposes of that paragraph unless

- (a) the country to which the person is to be removed is a prescribed country under paragraph 114(1)(s); or

(b) the person, following a reference of the claim to the Refugee Division pursuant to subsection 46.03, is determined by the Refugee Division not to be a Convention refugee. R.S.C. 1985 (4th Supp.), c. 28, s. 17; 1992, c. 49, s. 43.

### *Subsection (1)*

*Barrera v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 81, 99 D.L.R. (4th) 264, 151 N.R. 28 (Fed. C.A.).

The applicant was a permanent resident of Canada and also a person determined to be a Convention refugee. The applicant was convicted in Canada in 1983 of beating a 16-year-old boy unconscious, sodomizing him, and raping his 13-year-old girlfriend. Upon his release from jail the applicant was ordered deported notwithstanding the fact that he had previously been found to be a Convention refugee. The Court declined to consider the Charter issues raised by a ministerial decision to deport the refugee to his home country until the Minister had in fact exercised his discretion in that regard. The application was dismissed notwithstanding the Court's considerable reasons outlining the Charter issues involved in such a decision by the Minister.

*Hoang v. Canada (Min. of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35, 120 N.R. 193 (Fed. C.A.).

The appellant was ordered deported because he was a permanent resident who had been convicted of an offence for which a term of imprisonment of more than 6 months had been imposed; he had also been convicted of an offence for which the maximum term was 5 years or greater. The appellant had come to Canada as a stateless person from Vietnam and had been determined by the Minister in 1986 to be a convention refugee. The Court noted that the Immigration Appeal Board (which had decided this matter) correctly determined that its jurisdiction is only over whether a person should be removed from Canada and not as to the country of removal. Until the issue of deportation is settled, the Minister cannot make a decision as to the country of removal. Thus a statement by the Minister's representative as to the Minister's disposition to deport the appellant to Vietnam was not taken as a formal expression of the Minister's decision since the Minister was not, at the date of that statement, empowered to make the decision.

The Court determined that in dealing with the "double jeopardy" provisions of section 11(h) of the Charter deportation was not to be seen as a punishment of the person deported but a protection of those who remained. Further, deportation for serious offences affects neither section 7 nor section 12 of the Charter of Rights since it is not to be conceptualized as either a deprivation of liberty or a punishment. Finally, the Court noted that with respect to Canada's international obligations the United Nations convention relating to the status of refugees contained an exception to the prohibition against refoulement where the deportee had been convicted in the country where he was making the refugee claim of a particularly serious crime. The Court noted that the phrase "particularly serious crime" and "danger to the community" were not defined in the convention and therefore presumed that Parliament responsibly fulfilled its obligation when it enacted the Immigration Act.

Accordingly the appellant's appeal was dismissed.



**WHERE NO EXECUTION OF REMOVAL ORDER — *Idem* — *Idem*.**

54. (1) Where a person against whom a removal order is made is removed from or otherwise leaves Canada, the order shall be deemed not to have been executed if the person is not granted lawful permission to be in any other country, and that person may, notwithstanding section 55(1), come into Canada without the consent of the Minister.

(2) Where a person against whom a removal order is made is transferred to a foreign state in accordance with a transfer order made under the *Mutual Legal Assistance in Criminal Matters Act*, the removal order shall be deemed not to have been executed by reason only of the transfer of the person to the foreign state, and that person may, notwithstanding subsection 55(1), come into Canada without the consent of the Minister.

(3) Where a person against whom a conditional removal order is made is transferred to a foreign state in accordance with a transfer order made under the *Mutual Legal Assistance in Criminal Matters Act* and the conditional removal order subsequently becomes effective under subsection 32.1(6), the removal order shall be deemed not to have been executed by reason only of the transfer of the person to the foreign state, and that person may, notwithstanding subsection 55(1), come into Canada without the consent of the Minister. 1976-77, c. 52, s. 56; R.S.C. 1985 (4th Supp.), c. 30, s. 48; 1992, c. 1, s. 76; 1992, c. 49, s. 44.

**Subsection (2)**

*Saprai v. Canada (Min. of Employment & Immigration)* (1986), 3 F.T.R. 215 (Fed. T.D.).

The plaintiff was ordered deported on December 9, 1977 and contended that he had executed his own deportation order, lawfully entering the United States on January 12, 1986. The plaintiff contended that he had complied with section 56. Section 56 was held to be a provision that accorded a person, whom other countries refused to receive, the right to return to Canada until other arrangements could be made for deportation. It accords a temporary haven in Canada but does not operate to dissolve the deportation order against the person who, for example, passes through U.S. customs and immigration posts. There was no evidence that permission to be in the United States had been obtained from the American Customs and Immigration authorities if their permission was that described in section 56. Further, if the permission contemplated by section 56 was one that must be granted according to Canadian Law, then it was obvious on the facts that the Minister had never granted the applicant permission to be in any other country except India. Had the plaintiff removed himself voluntarily to India, then it might have been arguable that the plaintiff, himself, had executed his own deportation order. The Court refused to enjoin the Minister from detaining the plaintiff and deporting him to India. The plaintiff had not been allowed, pursuant to section 54, to leave Canada voluntarily and select the country for which he wished to depart, and, therefore, pursuant to section

54(2), the Minister, in attempting to detain the plaintiff for the purpose of deporting him to India, was performing the duties imposed by law.

*Mercier v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-309-85, April 25, 1985, affirmed (1985), 62 N.R. 73 (Fed. C.A.).

On November 17, 1982, following an inquiry, a deportation order was issued against the applicant because he had been convicted of an offence for which a maximum term of imprisonment of 10 years or more may be imposed, pursuant to section 19(1)(c) of the Act. The applicant's appeal against this deportation order was dismissed on August 14, 1984. On January 30, 1985, the applicant tried to gain admission to the United States without success and returned to Canada with the intention of provoking an inquiry where he might claim refugee status. When the applicant reappeared at the Canadian border, a senior immigration officer issued a Summons to Appear at an inquiry, pursuant to section 23 of the Act. That decision was countermanded by another senior immigration officer and the applicant's case was withdrawn on the ground that the deportation order, issued against the applicant, had never been executed. It was this decision that was attacked by the applicant, who was seeking a writ of *mandamus* requiring the adjudicator to conduct his inquiry. The decision to countermand the Summons to Inquiry was part of the administrative process. The Court did not intervene because it was of the view that the applicant had not been treated unfairly and that to intervene and issue a writ of *mandamus* would create a situation in which the respondent Minister would, on the one hand, have to execute a deportation order against the applicant and, on the other hand, have to conduct an inquiry with a view to admitting the applicant to the country.

An appeal from this decision was heard on June 28, 1985, and was dismissed. The appellant (applicant) sought to raise, for the first time, the assertion that the deportation order had been executed by the appellant himself when he left the country for a 6-week visit to Haiti from May 12, 1984, to June 30, 1984. No consideration was given to the submission on appeal because it was a question which was raised for the first time before the Court of Appeal. It was founded upon an allegation of fact which was never put in issue before the Trial Division. The Court noted that when sitting on appeal from the Trial Division, it sat as a Court of Appeal whose function was to decide whether the issues presented at trial were properly disposed of. It was not the Court's duty to determine other issues which, had they been raised at the Trial Division, might have resulted in a different outcome if the necessary factual basis had been established.

### Effect of Removal Orders

#### ***EFFECT OF DEPORTATION ORDER — Effect of exclusion order — Person may return to Canada.***

55. (1) Subject to section 56, where a deportation order is made against a person, the person shall not, after he is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister unless an appeal from the order has been allowed.

(2) Subject to section 56, where an exclusion order is made against a person, other than a person who has claimed to be a Convention Refugee, the person

shall not, after the person is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister during the twelve month period immediately following the day on which that person is removed from or otherwise leaves Canada unless an appeal from the order has been allowed.

(3) A person against whom a departure order has been made

(a) who

(i) complies with section 32.01, is issued a certificate of departure under that section and leaves Canada voluntarily before the expiration of the applicable period specified for the purposes of subsection 32.02(1), or

(ii) is removed from Canada before the expiration of that period and has been issued a certificate of departure under section 32.01, or

(b) who is detained before the expiration of the applicable period specified for the purposes of subsection 32.02(1), who is still in detention under this Act at the expiration of that period and who is subsequently removed from Canada,

may, if the person otherwise meets the requirements of this Act and the regulations, return to Canada without the written consent of the Minister. 1976-77, c. 52, s. 57; 1984, c. 40, s. 36; 1992, c. 49, s. 45.

### *Subsection (1)*

*Canada (Solicitor General) v. Kainth* (1993), 22 Imm. L.R. (2d) 114, 69 F.T.R. 148, affirmed, Fed. C.A., Doc. No. A-34-94, June 10, 1994.

The respondent was some years ago deported from Canada and pursuant to section 55 of the statute cannot be admitted without the Minister's consent. The Appeal Division purported to exercise its jurisdiction pursuant to section 77(3)(b) to grant the respondent, sponsored by his spouse, permanent residence in Canada. The issue was whether the Board's jurisdiction to grant relief under section 77 was sufficiently wide or unqualified to override the ministerial consent requirements in section 55. The Appeal Division was satisfied that there were sufficient humanitarian or compassionate grounds to forgive and forget the fact that the respondent had been deported some ten years ago. The application was dismissed.

Section 77(3)(b) deals with sponsored applications for landing of members of the family class. The statutory jurisdiction of the Appeal Division is defined in section 69.4(2) and includes questions of jurisdiction that may arise in relation to the refusal to approve an application for landing made by a member of the family class. Section 77(1)(b) requires a visa officer to refuse the application if the member of the family class does not meet the requirements of the Act or the regulations. The Appeal Division's equitable jurisdiction can only be exercised when dealing with a refusal on the ground that the member of the family class does not meet the requirements of the Act or regulations. The exercise of the Division's equitable jurisdiction may include a waiver of any statutory or regulatory requirement in this type of situation. A Minister's consent under section 55 is only one of the several requirements which the Appeal Division may waive in this type of situation



under its equitable jurisdiction. The Minister's consent is no more sacred than any other plain, unfettered or unqualified requirement of the Act. Accordingly, the application was dismissed.

*Kaur v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 1 (Fed. C.A.).

Satnam Singh made an application for permanent residence which was sponsored by the appellant, a landed immigrant, who had married him in India. The application was refused and the sponsor's appeal was dismissed by the Immigration Appeal Board. Satnam Singh had been deported from Canada and the consent of the Minister required for his admission into the country, had been refused. Requirement of the Minister's written consent set out in section 57(1) of the Immigration Act cannot be overcome and replaced by a favourable decision of the Immigration Appeal Board based on its so-called "equitable jurisdiction". The Court further noted that in the context of this case no evidence had been adduced which would have warranted the granting of equitable relief in any event. The Court distinguished the case of the *M.E.I. v. Narwal* (1990), 10 Imm. L.R. (2d) 183, on the basis that in that case the good faith of the spouses had never been in doubt.

*Bhawan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1239-87, June 22, 1987.

The applicant sought prohibition to prevent his removal from Canada pursuant to a deportation order dated January 5, 1984. The applicant came to Canada from Fiji as a landed immigrant. He became subject to a deportation order on January 5, 1984, and filed an appeal to the Immigration Appeal Board. While the appeal was pending, the applicant voluntarily returned to Fiji, and, in April 1986, the applicant came back to Canada. Prior to his return to Canada, the applicant's solicitor withdrew the appeal to the Immigration Appeal Board. The applicant's contention that the deportation was carried out by his leaving Canada for Fiji was rejected. The applicant could only leave Canada and select the country for destination with authorization from the Minister, and this was lacking in this case. Accordingly, the applicant had not complied with section 54 [s. 52] and the deportation order, dated January 5, 1984, could be executed to cause the applicant's removal from Canada.

*Mercier v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1512-85, November 17, 1986.

The applicant was admitted to Canada in 1974. Between 1978 and 1984 he was convicted of a number of criminal offences. During this period, on November 17, 1982, he was ordered deported. The applicant returned to his country of origin between May 12 and June 30, 1984. The applicant sought a declaration that the deportation order made against him had ceased to be valid by virtue of section 54 of the Immigration Act. It was held that the voluntary departure of someone who is the subject of a deportation order could only be made under section 54 with leave of the Minister. In the absence of such leave, the applicant could not be said to have carried out the removal order himself.

*Singh v. Canada (Min. of Employment & Immigration)* (1986), 6 F.T.R. 15 (Fed. T.D.).

This application for *certiorari* quashing the decision of the respondent Minister not to grant the Minister's consent to Saudagar Gill to enter Canada for the purpose of testifying as a witness before the Immigration Appeal Board was dismissed.

The applicant was the wife of Saudagar Gill. Her sponsorship of her husband had been refused and she had appealed to the Immigration Appeal Board. The Board issued a summons to the husband who was in India. The Minister's consent was required for the attendance of the witness because Gill had been previously deported. The original sponsorship had been refused for a variety of reasons, one of which was that the marriage offended section 4(3) of the Regulations. The Minister declined to give his consent to Gill returning to Canada, and, thus, Gill was unable to appear as a witness at the Immigration Appeal Board. It was held that the Minister's decision under section 57 was administrative. The Minister was not, in refusing consent, exercising a *quasi-judicial* function; therefore, he was not required to give reasons for his decision. Consequently, the failure to give reasons, in this case, could not give rise to relief by way of *certiorari*. Further, the relief sought was discretionary, and no basis for exercising that discretion in favour of the applicant was to be found on the facts of this case.

*Cambouras v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1870-83, April 11, 1984.

The applicant had been ordered deported at an earlier proceeding and entered Canada without a Minister's permit. At his inquiry, after the latter entry, he sought to establish that he was a permanent resident of Canada. The Federal Court approved the adjudicator's refusal to hear this evidence concluding that the applicant was in fact asking the adjudicator to revise the previous deportation order which was beyond the adjudicator's jurisdiction.

*R. v. Maunder* (1983), 46 Nfld. & P.E.I.R. 361, 135 A.P.R. 361 (Nfld. C.A.).

The appellant appealed a sentence of one year imposed under section 96. The appeal was dismissed because the appellant had disregarded other deportation orders, and following his removal from Canada pursuant to such orders, had returned to Canada without the consent of the Minister and engaged in criminal activity.

*Vega v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-261-82, February 15, 1983.

The applicant had left and re-entered Canada after having been ordered deported. The adjudicator erred in ruling that it was the applicant's responsibility to prove that he had obtained the Minister's consent before coming back into the country. That burden clearly lay upon the Commission. This error did not vitiate the adjudicator's decision since he did not rely upon the onus of proof to reach the conclusion that the applicant did not have the Minister's consent. The Court held, as well, that the consent of the Minister must be expressed and could not be implied.

*Ali v. Min. of Manpower & Immigration*, [1978] 2 F.C. 277, 82 D.L.R. (3d) 401, 20 N.R. 337 (Fed. C.A.).

The applicant was granted landed immigrant status in Canada February 15, 1973.

A deportation order was made against her on March 12, 1975. The applicant appealed the deportation order to the Immigration Appeal Board, that Board dismissed the appeal, and the deportation order was executed on February 24, 1976. The applicant returned to Canada without the permission of the Minister on June 26, 1976. A second deportation order was made on July 15, 1976 on the ground that the applicant had returned to Canada without the consent of the Minister. The applicant was informed that she had no right of appeal in respect of the second order. The applicant appealed in any event and the Board dismissed the application "for want of jurisdiction." The applicant asserted that she was a permanent resident according to the definition of that term under the old Immigration Appeal Board Act. The Court concluded that the term "permanent resident" under the old Act did not include persons who were previously permanent residents and who had been validly deported.

### ***Subsection (2)***

*Vega v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-261-82, February 15, 1983.

For digest, see section 55, subheading *Subsection (1)*, *supra*.

*Grewal v. Min. of Employment & Immigration*, [1981] 1 F.C. 12, 112 D.L.R. (3d) 30, 37 N.R. 535 (Fed. C.A.).

The applicant sought to enter Canada on January 2, 1980. An inquiry followed, at the conclusion of which an adjudicator excluded the applicant on the ground that he was described in section 19(1)(i). It was common ground that the applicant was a person described under section 19(1)(i) on January 2, 1980. However, when the adjudicator made the order, more than twelve months had elapsed since the applicant left Canada and the Court ruled that the applicant was, at that time, not a member of the inadmissible class described in section 19(1)(i). The relevant time was when the adjudicator made his order rather than when the immigration officer dated his report.

### ***REPAYMENT OF COSTS OF DEPORTATION.***

**55.1** A person to whom a departure order is issued that is deemed under section 32.02 to be a deportation order and who is subsequently removed from Canada shall not come into Canada unless the person has paid to Her Majesty the removal costs prescribed under regulations made pursuant to paragraph 114(1)(r) or, in the absence of any such regulations, has reimbursed Her Majesty for any costs incurred by Her Majesty in deporting the person. 1992, c. 49, s. 46.

### ***WHERE PERSON ALLOWED TO RETURN BY APPEAL DIVISION — Where execution of removal order stayed.***

**56. (1)** Where, pursuant to section 75, the Appeal Division allows a person to return to Canada for the hearing of his appeal against a removal order, the person may come into Canada for that purpose without the consent of the Minister.



(2) Where, pursuant to subsection 73(1), the Appeal Division directs that the execution of a removal order be stayed, the person against whom the order was made does not require the consent of the Minister to come into Canada at any time during the period for which that execution is stayed. 1976-77, c. 52, s. 58; R.S.C. 1985 (4th Supp.), c. 28, s. 33.

## PART IV

### CLAIMS AND APPEALS

#### Establishment of Board

#### *BOARD CONTINUED — Constitution of Board.*

57. (1) The Immigration and Refugee Board, comprising three divisions, to be called the Convention Refugee Determination Division, the Immigration Appeal Division and the Adjudication Division, is hereby continued.

(2) The Board shall consist of the Chairperson of the Immigration and Refugee Board and the members of the Refugee Division, the Appeal Division and the Adjudication Division. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 47.

*CHAIRPERSON — Chairperson is member of all Divisions — Chief executive officer — Delegation — Idem — Absence, incapacity or vacancy.*

58. (1) The Chairperson shall be appointed by the Governor in Council to hold office during good behaviour for a term not exceeding seven years, but may be removed by the Governor in Council at any time for cause.

(2) The Chairperson is by virtue of holding that office a member of the Refugee Division, the Appeal Division and the Adjudication Division.

(3) The Chairperson is the chief executive officer of the Board and has supervision over and direction of the work and staff of the Board.

(4) The Chairperson may authorize any Deputy Chairperson or Assistance Deputy Chairperson of the Refugee Division or Appeal Division and any coordinating member of the Refugee Division to exercise any power or perform any duty or function of the Chairperson under this Act, other than

- (a) the power to make rules under subsection 65(1),
- (b) any power, duty or function in relation to the Adjudication Division, or
- (c) the power to delegate under this subsection,

and, if so exercised or performed, the power, duty or function shall be deemed to have been exercised or performed by the Chairperson.

(4.1) The Chairperson may authorize the Director General of the Adjudication Division or any director of the Adjudication Division to exercise any power or perform any duty or function of the Chairperson under this Act in relation to the Adjudication Division, other than

- (a) the power to make rules under subsection 65(1), or
- (b) the power to delegate under this subsection,

and, if so exercised or performed, the power, duty or function shall be deemed to have been exercised or performed by the Chairperson.

(5) In the event of the absence or incapacity of the Chairperson, or if the office of Chairperson is vacant, the Minister may authorize the Deputy Chairperson (Convention Refugee Determination Division) or the Deputy Chairperson (Immigration Appeal Division) to act as Chairperson for the time being, and a Deputy Chairperson so acting has and may exercise all the powers and perform all the duties and functions of the Chairperson. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 48.

**CONSTITUTION OF REFUGEE DIVISION — Designations — Coordinating members — Membership in other Division.**

59. (1) The Refugee Division shall consist of such full-time members and part-time members as are appointed by the Governor in Council.

(2) The Governor in Council shall designate from among the full-time members of the Refugee Division

- (a) one member to be Deputy Chairperson (Convention Refugee Determination Division); and
- (b) not more than ten members to be Assistant Deputy Chairpersons (Convention Refugee Determination Division).

(3) The Governor in Council shall designate from among the full-time members of the Refugee Division members to be coordinating members at the ratio of one coordinating member to every fifteen members of the Refugee Division.

(4) The members of the Refugee Division are by virtue of holding that office members of the Appeal Division, and the members of the Appeal Division are by virtue of holding that office members of the Refugee Division, but members of the Refugee Division shall not be counted in determining the membership of the Appeal Division under subsection 60(1). R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 49.

**CONSTITUTION OF APPEAL DIVISION — Designations.**

60. (1) The Appeal Division shall consist of not more than thirty members.

(2) The Governor in Council shall designate from among the members of the Appeal Division one member to be Deputy Chairperson (Immigration Appeal Division) and not more than five members to be Assistant Deputy Chairpersons (Immigration Appeal Division). R.S.C. 1985, (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 49.

**APPOINTMENT AND TENURE OF MEMBERS — Qualification — Re-appointment — Full-time members.**

61. (1) Each member of the Refugee Division and the Appeal Division shall be appointed by the Governor in Council to hold office during good behaviour for a term not exceeding seven years.

(2) The Deputy Chairperson (Immigration Appeal Division), a majority of the Assistant Deputy Chairpersons (Immigration Appeal Division) and not less than ten per cent of the members of the Refugee Division and the Appeal Division shall be barristers or advocates of at least five years standing at the bar of a province or notaries of at least five years standing at the *Chambre des notaires du Québec*.

(3) The Chairperson, each member of the Refugee Division and each member of the Appeal Division are eligible for re-appointment in the same or another capacity.

(4) [Repealed 1992, c. 49, s. 50.].

(5) The Chairperson, each full-time member of the Refugee Division and each member of the Appeal Division shall devote the whole of their time to the performance of their duties under this Act. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 50.

**REMUNERATION — Fees — Expenses — Application of Public Service Superannuation Act.**

62. (1) The Chairperson, each full-time member of the Refugee Division and each member of the Appeal Division shall be paid such remuneration as is fixed by the Governor in Council.

(2) Each part-time member of the Refugee Division shall be paid such fees for services rendered under this Act as are fixed by the Governor in Council.

(3) The Chairperson, each member of the Refugee Division and each member of the Appeal Division are entitled to be paid reasonable travel and living expenses incurred by them while absent from their ordinary place of residence in the course of the performance of their duties under this Act.

(4) For the purposes of the *Public Service Superannuation Act*, the Chairperson and the members of the Refugee Division and the Appeal Division shall



be deemed to be employed in the Public Service. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 51.

***DISPOSITION AFTER MEMBER CEASES TO HOLD OFFICE — Disposition where member unable to take part.***

63. (1) Any person who has resigned or otherwise ceased to hold office as a member of the Refugee Division, Adjudication Division or Appeal Division may, at the request of the Chairperson, at any time within eight weeks after that event, make, or take part in, the disposition of any matter previously heard by that person and, for that purpose, the person shall be deemed to be such a member.

(2) Where a person to whom subsection (1) applies or any other member by whom a matter has been heard is unable to take part in the disposition thereof or has died, the remaining members, if any, who heard the matter may make the disposition and, for that purpose, shall be deemed to constitute the Refugee Division or the Appeal Division, as the case may be. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 52.

***Subsection (2)***

*Weerasinge v. Canada (Min. of Employment & Immigration)* (1993), 22 Imm. L.R. (2d) 1, [1994] 1 F.C. 330, 17 Admin. L.R. (2d) 214, 161 N.R. 200 (C.A.).

Absent consent, a claimant is entitled to a hearing by a two-member panel and is entitled to the benefit of any disagreement between them. Recourse to section 63(2) is a serious matter. As a matter of law and to ensure that justice is seen to have been done, when section 63(2) is properly engaged a complete statement of the material circumstances should be put on the record. Such a statement may, of course, be included in the reasons for decision. This appeal was allowed because there was nothing properly on the record which supported a recourse to section 63(2).

***INQUIRIES — Appointment — Powers — Inquiry public — Confidentiality — Idem — Rule of evidence — Right to be heard.***

63.1 (1) Where the Chairperson considers it appropriate to do so, the Chairperson may recommend to the Minister that an inquiry be held as to whether any member of the Refugee Division or Appeal Division should be subject to any disciplinary measures for any reason set out in any of paragraphs 63.2(2)(a) to (d).

(2) Where the Minister considers that it is appropriate that an inquiry under this section be held, a judge, supernumerary judge or former judge of the Federal Court, in this section and section 63.2 referred to as the “judge”, shall conduct the inquiry.

(3) A judge conducting an inquiry under this section has all the powers,

rights and privileges that are vested in a superior court and, without restricting the generality of the foregoing, has the power

(a) to issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to the inquiry and to bring and produce any document, book or paper that the person has or controls relative to the inquiry; and

(b) to administer oaths and examine any person on oath.

(4) Subject to subsections (5) and (6), an inquiry under this section shall be conducted in public.

(5) Where a judge conducting an inquiry under this section is satisfied, during the inquiry, or as a result of the inquiry being conducted in public, as the case may be,

(a) that matters involving public security may be disclosed,

(b) that financial or personal or other matters may be disclosed of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that the inquiry be conducted in public, or

(c) that there is a serious possibility that the life, liberty or security of a person would be endangered,

the judge may, on application therefor, take such measures and make such order as the judge considers necessary to ensure the confidentiality of the inquiry.

(6) Where a judge conducting an inquiry under this section considers it appropriate to do so, the judge may take such measures and make such order as the judge considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (5).

(7) A judge conducting an inquiry under this section is not bound by any legal or technical rules of evidence and, in any proceedings of the inquiry, the judge may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

(8) Every person in respect of whom an inquiry under this section is conducted shall be given reasonable notice of the subject-matter of the inquiry and of the time and place of any hearing thereof and shall be given an opportunity, in person or by counsel, to be heard at the hearing, to cross-examine witnesses and to adduce evidence. 1992, c. 49, s. 53.

***Subsection (8)***

*Balachandran v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-773-91, April 21, 1993.

The appellant's claim for refugee status was dismissed on the basis that he had no reasonable fear of persecution and that he had an internal flight alternative in his own country.

The question of an internal flight alternative was expressly raised by the refugee hearing officer in the questions he put to the appellant during the course of the hearing. Further, the question was debated in the submissions made to the Board by the refugee hearing officer and counsel for the claimant (appellant). This constituted sufficient notice of that issue being raised and made alive before the Board. There was no need for a more formalistic kind of notice or procedure.

***REPORT OF INQUIRY — Recommendations — Governor in Council may suspend or remove.***

63.2 (1) After an inquiry under section 63.1 has been completed, the judge who conducted the inquiry shall report the conclusions of the inquiry to the Minister and submit the report of the inquiry to the Minister.

(2) Where an inquiry under section 63.1 has been held and, in the opinion of the judge who conducted the inquiry, the member of the Refugee Division or Appeal Division in respect of whom the inquiry was held

- (a) has become incapacitated from the due execution of that office by reason of infirmity,
- (b) has been guilty of misconduct,
- (c) has failed in the due execution of that office, or
- (d) has been placed, by conduct or otherwise, in a position that is incompatible with the due execution of that office,

the judge may, in the report of the inquiry, recommended that the member be suspended without pay or be removed from office or may recommend that such other disciplinary measure as the judge may specify be taken.

(3) Forthwith on receiving a report under subsection (1) the Minister shall forward the report to the Governor in Council, who may suspend without pay, remove from office or take any other disciplinary measure against the member to whom the report relates. 1992, c. 49, s. 53.

***COMPOSITION OF ADJUDICATION DIVISION — Appointment — Powers, duties and functions.***

63.3 (1) The Adjudication Division shall consist of the Director General of the Adjudication Division and such directors and adjudicators as are necessary to carry out the duties and functions of adjudicators under this Act.



(2) The Director General, the directors of the Adjudication Division and the adjudicators shall be appointed or employed in accordance with the *Public Service Employment Act*.

(3) The Chairperson, the Director General and the directors of the Adjudication Division have all the powers and may carry out the duties and functions of adjudicators. 1992, c. 49, s. 53.

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

It is not a pre-condition to the operation of section 19(1)(c) that the Governor-in-Council shall have considered the question of rehabilitation and be dissatisfied that the person concerned has brought himself within the exception. The report mandated by section 27(1) requires the authorizing immigration officer to possess information that the person concerned has been convicted of the kind of criminal act specified in section 19(1)(c) and to have knowledge that the person concerned has not satisfied the Governor-in-Council as to his rehabilitation.

Policy directives, whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public. The procedural formalities which are required in respect to an immigration officer when initiating a section 27(1) report are minimal, firstly, because this is a purely administrative decision and, second, because the officer when issuing the section 27(1) report is merely the initiator of the inquiry process. An immigration officer before issuing a section 27(1) report is, therefore, not required to give the person concerned an opportunity to answer allegations contained in that report. On the facts, the immigration officer who issued the section 27(1) report had sufficient knowledge and information upon which to base the report; further, the applicant was given full particulars on the allegations against him.

The Court of Appeal adopted the motion's judge's findings, that there was nothing irregular in the fact that the high-profile nature of the case placed pressure on the respondent's representatives to proceed with dispatch.

The requirement of institutional independence is included in the rules of natural justice as well as enshrined in the Charter.

The test for institutional independence is whether a reasonable and right-minded individual, having informed himself of the scheme whereby adjudicators are appointed under the Immigration Act and of the basis upon which they perform their duties, would be likely to conclude that an adjudicator appointed under and acting pursuant to that scheme, more likely than not, would decide fairly the inquiries under the Immigration Act over which he presided. While the case-presenting officers and adjudicators are both civil servants under the direction of the same Minister, they operate in separate and distinct divisions of the Commission. Case-presenting officers have no supervisory role, vis-à-vis adjudicators. They do not report to a common superior and it is only at the apex of the organization chart that their respective hierarchies merge. As far as legal direction is concerned, adjudicators can and do seek advice on difficult legal issues from lawyers on the staff of the Adjudication Directorate, who have no connection or association with the Enforcement Branch. On the subject of monitoring, there is evidence that the monitoring practice focuses primarily on how hearings are conducted; with respect to

security of tenure, adjudicators, like other civil servants, have the protection afforded pursuant to section 31 of the Public Service Employment Act. Additionally, they have the protection of a three-stage grievance procedure. The fact that adjudicators are members of the same bargaining unit as case-presenting officers, is a neutral circumstance that does not give rise to any apprehension one way or the other. The practice of appointing adjudicators to other positions on an acting basis does not give rise to reasonable apprehension of a lack of independence. The Court relied on the uncontradicted evidence of an adjudicator to the effect that the decisions made by him were made independently and without direction from anyone else.

Finally, it was pointed out that the assignment of cases is rationally based; complex cases are usually assigned to the more experienced adjudicators. There was nothing to suggest that particular cases were assigned to particular adjudicators, let alone any evidence to suggest that the adjudicator chosen to conduct this inquiry was chosen on any basis other than the rational basis referred to previously. The Court concluded for these reasons that reasonable persons, reasonably informed, would view adjudicators appointed under the Immigration Act as being independent, keeping in mind the fact that they are for the most part laypersons in the hierarchy of quasi-judicial tribunals; and bearing in mind that their decisions are subject to judicial review by the Court; and that they have all taken an oath of office to "faithfully and honestly fulfill their duties" devolving upon them. Accordingly, the appellant's appeal was dismissed.

***HEAD OFFICE — Executive Director — Other staff — Application of Public Service Superannuation Act — Experts.***

**64. (1) The head office of the Board shall be in the National Capital Region as described in the schedule to the *National Capital Act* and the Chairperson and such members of the Refugee Division and members of the Appeal Division as may be designated by the Governor in Council shall live in that Region or within reasonable commuting distance thereof.**

**(2) There shall be an Executive Director of the Board, who shall be appointed by the Governor in Council to hold office during pleasure for a term fixed by the Governor in Council and shall be paid such remuneration as the Governor in Council may fix and who shall exercise or perform such administrative powers, duties or functions as may be prescribed by rules made under subsection 65(1) or assigned by the Chairperson.**

**(3) Such officers, employees and counsel and refugee hearing officers as are necessary for the proper conduct of the business of the Board shall be appointed in accordance with the *Public Service Employment Act*.**

**(4) For the purposes of the *Public Service Superannuation Act*, the Executive Director of the Board and the officers, employees and counsel of the Board shall be deemed to be employed in the Public Service.**

**(5) The Chairperson may engage and, subject to the approval of the Treasury Board, fix the remuneration of experts or persons who have special knowledge**

to assist the Refugee Division, Appeal Division or Adjudication Division in any matter. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 54.

***RULES — Tabling in Parliament — Guidelines — Idem.***

65. (1) Subject to the approval of the Governor in Council, the Chairperson, in consultation with the Deputy Chairperson (Convention Refugee Determination Division) the Deputy Chairperson (Immigration Appeal Division) and the Director General (Adjudication Division) may make rules

(a) governing the activities of, and the practice and procedure in, the Refugee Division, the Appeal Division and the Adjudication Division, including the functions of counsel employed by the Board.

(b) prescribing a system of priorities for dealing with matters before the Refugee Division, Appeal Division or Adjudication Division;

(c) prescribing the information that may be required under subsection 46.03(2) and the manner and the time within which it must be provided;

(d) governing the determination under subsection 69.1(7.1) of claims of persons who claim to be Convention refugees; and

(e) prescribing any matter that is authorized by this Act to be prescribed by the rules.

(2) The Minister shall cause a copy of all rules made pursuant to subsection (1) to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the approval of the rules by the Governor in Council.

(3) The Chairperson may, after consulting with the Deputy Chairperson and the Assistant Deputy Chairpersons of the Refugee Division and the Appeal Division and the coordinating members of the Refugee Division, issue guidelines to assist the members of the Refugee Division and Appeal Division in carrying out their duties under this Act.

(4) The Chairperson may, after consulting with the Director General and the directors of the Adjudication Division, issue guidelines to assist the members of the Adjudication Division in carrying out their duties under this Act. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 55.

***ANNUAL REPORT.***

66. The Chairperson shall, before the commencement of each fiscal year, submit to the Minister a report on the activities of the Board in the preceding calendar year, and the Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives the report. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 56.



**Convention Refugee Determination Division****SOLE AND EXCLUSIVE JURISDICTION — Powers.**

67. (1) The Refugee Division has, in respect of proceedings under section 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

(2) The Refugee Division, and each member thereof, has all the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and, without restricting the generality of the foregoing, may, for the purposes of a hearing,

(a) issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to the subject-matter of the hearing and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;

(b) administer oaths and examine any person on oath;

(c) issue commissions or requests to take evidence in Canada; and

(d) do any other thing necessary to provide a full and proper hearing. R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**Subsection (1)**

*Khakh v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 548, 23 Imm. L.R. (2d) 38, 70 F.T.R. 26.

The applicant sought to overturn a decision of a credible basis panel holding a hearing under refugee provisions no longer in effect. The applicant alleged a reasonable apprehension of bias. The respondent argued that in failing to raise an objection on this basis before the credible basis panel, the applicant waived his rights to subsequently raise the issue. A reasonable apprehension of bias should be raised at the first opportunity. There is no waiver unless the party entitled to make the objection is fully aware of the nature of the disqualification and has adequate opportunity to make the objection. The Court will imply waiver where a party or its representative knows of the facts that give rise to an apprehension of bias and, notwithstanding, does not object. The party or its representative must be fully cognisant of the right to take objection. In this case, the adjudicator had, after the applicant requested an interpreter, refused the interpreter after testing the applicant in English. As the hearings progressed the adjudicator noticed that the applicant's English was deteriorating and this was taken to mean that the adjudicator had formed the view that the applicant was not doing his best in English. The failure of the unrepresented applicant to object to the adjudicator's jurisdiction on the basis of reasonable apprehension of bias, after this comment was made, was not taken to be a waiver of his rights to object before the Federal Court.

*Urbanek v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 153, 144 N.R. 77 (Fed. C.A.).

The purpose of the refugee determination system is to provide a safe haven to those

who genuinely need it and not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way.

### **Subsection (2)**

*Kusi v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 281, 65 F.T.R. 58.

An adjudicator and member of the Immigration and Refugee Board were conducting a credible basis hearing into the claim of a Convention refugee claimant, pursuant to provisions of the Immigration Act in effect on August 19, 1992.

The tribunal accepted as evidence notes taken by an immigration officer, which recorded answers given to him at the port of entry by the applicant. The applicant contested the accuracy of the notes and asked that the officer be produced for cross-examination, a request which was denied by the tribunal.

The decision by the tribunal that there was no credible basis to the applicant's claim was set aside and the matter was remitted back for determination in accordance with the law. Specifically, the Court found that given the importance of the interest, namely the applicant's claim to be a Convention refugee, and given the fact that the applicant contested the accuracy of the notes which were relied upon by the tribunal, the rules of natural justice and of fundamental justice required that the cross-examination, which was sought, be allowed. The Court relied on the jurisprudence in *Canada (Min. of Employment & Immigration) v. Leal* (1991), 129 N.R. 383 (Fed. C.A.) and *Cheung v. Canada (Min. of Employment & Immigration)* (1981), 122 D.L.R. (3d) 41.

**Editor's Note:** Although occurring in the context of a repealed refugee hearing procedure, the principle in this case may have a broader application.

*Sivaguru v. Canada (Min. of Employment & Immigration)* (1992), 16 Imm. L.R. (2d) 85 (Fed. C.A.).

The appellant testified that he was a supporter or member of a Tamil organization known as LTTE. He said that he was unaware of any violence engaged in by the LTTE between 1979 and 1983. A Board member hearing the evidence initiated on his own a request for information from the Board's documentation centre on the violent activities of the LTTE. After obtaining the information and without disclosing it to the Refugee Hearing Officer or counsel, the Board member then questioned the appellant and contradicted him with the information.

The appellant testified that he had been warned about the particular member in question and had been warned not to tell him the truth about any violent activities of the LTTE or risk being classified as a terrorist and not allowed to remain in Canada.

The Immigration and Refugee Board does not possess the powers of the Court. Its members are not judges. They are not bound by any legal or technical rules of evidence. They are required to deal with all proceedings as informally and expeditiously as the circumstances and the considerations of fairness permit.

An essential requirement for such a hearing is that the Board act with impartiality. Impartiality refers to a state of mind or attitude. It connotes an absence of bias, actual or perceived. For a "hearing" to be worthy of the description the Board must be willing to give the evidence the dispassionate and impartial consideration it requires in order to arrive at the truth. The difficulty in getting at the full story is recognized by the nature

of powers which are conferred by subsections 67(2) and 68(4). The flexible provisions of the latter subsection permit the Board to take judicial notice of facts and to take notice of other facts, information and opinion within its specialized knowledge provided it does so in the manner authorized by the statute. The Act does not permit a member of the Board to embark upon a quest for evidence in the manner which was adopted in this case. That method of proceeding subverts its function as an impartial tribunal regardless of the legitimate concern which motivated the request. The search for evidence was secretly initiated and the tenor of the questions put after the information was acquired suggested that the information was going to be used to devastating effect. The Board member might have openly revealed his misgivings about the evidence at the hearing where a course of action known to all concerned could have been decided upon and initiated. Accordingly, the appeal was allowed, the decision of the Board set aside, and the matter referred back for rehearing and redetermination by a differently constituted panel of the Refugee Division.

*Salinas v. Canada (Min. of Employment & Immigration)*, 17 Imm. L.R. (2d) 118, 6 Admin. L.R. (2d) 154, 142 N.R. 211, [1992] 3 F.C. 247, 57 F.T.R. 159n (C.A.).

This was an appeal from an order of the Trial Division whereby a decision of the Refugee Division to reconvene a hearing into the respondent's claim for refugee status was quashed and the Refugee Division ordered to render a decision on the basis of the evidence before it. The basis of the respondent's claim was her fear of persecution by agents of the state of Panama, which was headed by General Noriega. Some time after the conclusion of the respondent's hearing, but before a decision was rendered, the political situation in Panama changed. The presiding member of the panel notified the respondent that the hearing would be reconvened for the purpose of hearing evidence on these recent changes.

The appeal was allowed. The Refugee Division did not exceed its jurisdiction in reconvening the hearing. Section 68 endows the Refugee Division with powers and duties in relation to any proceedings before it. The distinction has been drawn by Parliament between "proceedings" and a "hearing" before the Refugee Division. The hearing is to be conducted in a manner required by section 69.1. The "hearing" is a step in any proceedings. "Proceedings" is a wider term encompassing the entire matter before the Refugee Division including the hearing itself. The Minister, pursuant to section 69.2(1), is able to initiate proceedings for a determination whether any person who was determined to be a Convention refugee has ceased to be so. The Court found force in the argument that evidence as to the change of conditions is better addressed in the same proceedings to the Refugee Division's determination.

The Refugee Division was not *functus officio*. It had yet to make a determination of the claim. Until it did, the proceedings were pending and finality had not been reached. In order to arrive at its decision, the Refugee Division could exercise the power conferred by the statute, provided it did so properly by giving the respondent an opportunity to be heard at the reconvened hearing. An inquiry into any change of conditions in the appellant's homeland comes within the general mandate of the Refugee Division in determining the claim.

In *Lawal v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 404, the Court ruled that the only way for the Refugee Division, after the end of a hearing but before decision, to consider new evidence beyond that of which it might take judicial



notice was by reopening the hearing. The Court's decision in *Longia v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 288, applies only where the Refugee Division has already reached a decision.

The appeal was allowed. The order of the Trial Division was set aside and the respondent's claim for refugee status was referred back to the Refugee Division for a continuation of the reconvened hearing.

*Mahendran v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 30, 134 N.R. 316 (Fed. C.A.).

Members of the Refugee Division of the Immigration and Refugee Board are enabled to examine any person on oath. If a board member has problems with testimony, he or she is entitled to conduct questioning of the appellant in the proper discharge of his or her duties. The nature of the questioning, however, can be examined to determine whether there is merit to the submission that a member of the tribunal assumed the role of prosecutor and crossed the line between acceptable conduct and unacceptable conduct for members of the quasi-judicial body. The Court expressed concern at the lengthy nature of the cross examination in this case and noted that it would have been preferable for the board member to have left the main burden of questioning the appellant to the refugee hearing officer. There was, however, no basis for allowing an appeal from the Refugee Division decision that the appellant was not a convention refugee. A further objection was made about the admissibility of a photocopy of a telex. The Court noted that the scheme of the Act and Regulations leaves it to the tribunal to decide the weight which it will ascribe to any of the evidence before it. Here there was other cogent evidence which supported the Board's negative findings on credibility and this ground of appeal was for that reason also unsuccessful.

*Lawal v. Canada (Min. of Employment & Immigration)* (1991), 78 D.L.R. (4th) 522 (Fed. C.A.).

The applicant made a refugee claim and, after the credible basis hearing had adjourned, the applicant's counsel sent a letter requesting a re-opening of the hearing for the purpose of introducing into evidence an article from a newspaper in Nigeria. The Board, upon receipt of the letter, instituted its own inquiries, requested information from its own document centre and then forwarded those documents to counsel for the applicant informing counsel that it proposed to take "judicial notice" of all this material. The Board, in addition, seems to have initiated further inquiries with respect to the authenticity of the material provided by the applicant's counsel. Section 67(2) only gives the Board power to institute inquiries on its own "for the purpose of a hearing" and these powers may only be invoked "if necessary to provide a full and proper hearing." Finally, the Court noted that section 69.1(4) specifically requires the Refugee Division to hold its hearings in the presence of the claimant. Accordingly, the section 28 application was allowed, the decision of the Board was set aside and the matter was remitted for a new hearing to be held in the presence of the claimant.

### ***SITTINGS — Informal proceedings — Rules of evidence — Notice of facts — Notification of intention.***

**68. (1) The Refugee Division shall sit at such times and at such places in**

Canada as are considered necessary by the Chairperson for the proper conduct of its business.

(2) The Refugee Division shall deal with all proceedings before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

(4) The Refugee Division may, in any proceedings before it, take notice of any facts that may be judicially noticed and, subject to subsection (5), of any other generally recognized facts and any information or opinion that is within its specialized knowledge.

(5) Before the Refugee Division takes notice of any facts, information or opinion, other than facts that may be judicially noticed, in any proceedings, the Division shall notify the Minister, if present at the proceedings, and the person who is the subject of the proceedings of its intention and afford them a reasonable opportunity to make representations with respect thereto. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 57.

### *Subsection (2)*

*Sivaguru v. Canada (Min. of Employment & Immigration)* (1992), 16 Imm. L.R. (2d) 85 (Fed. C.A.).

The appellant testified that he was a supporter or member of a Tamil organization known as LTTE. He said that he was unaware of any violence engaged in by the LTTE between 1979 and 1983. A Board member hearing the evidence initiated on his own a request for information from the Board's documentation centre on the violent activities of the LTTE. After obtaining the information and without disclosing it to the Refugee Hearing Officer or counsel, the Board member then questioned the appellant and contradicted him with the information.

The appellant testified that he had been warned about the particular member in question and had been warned not to tell him the truth about any violent activities of the LTTE or risk being classified as a terrorist and not allowed to remain in Canada.

The Immigration and Refugee Board does not possess the powers of the Court. Its members are not judges. They are not bound by any legal or technical rules of evidence. They are required to deal with all proceedings as informally and expeditiously as the circumstances and the considerations of fairness permit.

An essential requirement for such a hearing is that the Board act with impartiality. Impartiality refers to a state of mind or attitude. It connotes an absence of bias, actual or perceived. For a "hearing" to be worthy of the description the Board must be willing to give the evidence the dispassionate and impartial consideration it requires in order to arrive at the truth. The difficulty in getting at the full story is recognized by the nature

of powers which are conferred by subsections 67(2) and 68(4). The flexible provisions of the latter subsection permit the Board to take judicial notice of facts and to take notice of other facts, information and opinion within its specialized knowledge provided it does so in the manner authorized by the statute. The Act does not permit a member of the Board to embark upon a quest for evidence in the manner which was adopted in this case. That method of proceeding subverts its function as an impartial tribunal regardless of the legitimate concern which motivated the request. The search for evidence was secretly initiated and the tenor of the questions put after the information was acquired suggested that the information was going to be used to devastating effect. The Board member might have openly revealed his misgivings about the evidence at the hearing where a course of action known to all concerned could have been decided upon and initiated. Accordingly, the appeal was allowed, the decision of the Board set aside, and the matter referred back for rehearing and redetermination by a differently constituted panel of the Refugee Division.

### ***Subsection (3)***

*Siad v. Canada (Secretary of State)*, Fed. T.D., Doc. No. A-1060-92, April 12, 1994.

This was an application to review a negative decision of the CRDD. The applicant was found to have been excluded from the status of a refugee by article 1.F(a) of the U.N. Convention on Refugees. The claimant was the son of the former President of Somalia, Mohammed Siad Barre, who was deposed in January, 1991. The tribunal found serious reason for considering that the claimant had committed crimes against humanity or acts contrary to the purposes and principles of the U.N. because it concluded that he had in fact been the governor of a notorious prison in Somalia. The claimant denied the fact and the Minister called two witnesses who gave evidence identifying the applicant as the governor.

It is impossible to lay down general rules as to the kind and degree of disclosure which must be required by tribunals of the CRDD. It must always be recognized that tribunals have a wide discretion as to the procedure they adopt and by virtue of section 68(3) of the Immigration Act, the Refugee Division is not bound by traditional rules of evidence.

The tribunal in this case denied a fair hearing to the claimant because of the casual approach it took to the receipt of evidence in support of the Minister's contention that the claimant had been a prison governor. Without laying down any disclosure guidelines, the Court concluded that fairness required that where the Minister was intending to prove that there were serious reasons for considering that the claimant has been guilty of crimes against humanity or acts contrary to the principles of the United Nations, he should make every reasonable effort to provide the claimant's counsel with copies of statements from witnesses or records of interviews with them or at least "will-say" statements. The kind of cursory information given in this case over the telephone was not sufficient. If such disclosure has not been made, the tribunal should not proceed, where the claimant so requests, until it is made. There may be special circumstances, such as those involving national security or the safety of witnesses, where disclosure will have to be restricted. No such circumstances were invoked by the Minister in this case.

The Court had some doubt about the relevancy of the personal information forms



of the witnesses, which had been requested by counsel, but made no decision with respect to the requirement that personal information forms be disclosed. Previous statements given by the witnesses in respect of the applicant should have been disclosed and it should have been apparent to the tribunal that fairness required that the applicant be given every reasonable opportunity to prepare for cross-examination of these witnesses. This was especially true because the testimony given under oath by the witnesses was such that they indicated no first-hand knowledge of the position actually occupied by the applicant. The witnesses had inferred from seeing the applicant in uniform in the area of the prison and from what they were told by others that he was its governor. The tribunal was entitled to receive such evidence but fairness required that the applicant be given a reasonable opportunity to test it through cross-examination.

The other element of unfairness in the proceedings was the use made by the tribunal of an unsworn statement of a university professor as to the role of the applicant. While the tribunal was not bound by the formal rules of evidence, in a situation such as this the tribunal was not acting in accordance with fairness in receiving this unsworn evidence and relying on it. The opinions of the university professor as to who the governor of the prison was were not in the same category as general articles or books which he had written on Somalia, which writings had apparently been referred to in other tribunal hearings. The use of general treatises and articles may well be justified as providing access to generally recognized facts, but the opinions of the professor in this case included statements purportedly identifying this particular applicant as performing a particular role. These statements were not in affidavit form and did not purport to be based on the author's first-hand knowledge. The sources of this information were not identified. In these circumstances it was not appropriate for the tribunal to accept this very critical material as evidence without its author at least being available for cross-examination when the applicant so requested.

The Court could not say that the result reached by the tribunal would have been the same in the absence of these lapses from fairness. Accordingly, the application was allowed and the matter referred back to a differently constituted panel.

*Arumuganathan v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 161.

The applicant was a citizen of Sri Lanka and with her three infant children claimed refugee status on the basis of their race, religion, political opinion and membership in a particular social group. The rejection of the applicant's claims was based on the negative finding of credibility. The tribunal admitted into evidence the Minister's factum from the husband's leave application for judicial review. The husband's claim to Convention refugee status had been advanced separately from the wife's and had been rejected because it had no credible basis. The refugee hearing officer suggested to the Board that, to the extent that the applicant's claim depended on her husband's experiences, it would not be unreasonable to conclude that if the husband's claim was unsuccessful, her claim was likewise "hollow".

The Board was correct in determining that the Minister's factum could be admitted into evidence and that it was the duty of the Board to assess that evidence and decide what weight to ascribe to it. However, given the inflammatory nature of the evidence it was also incumbent on the Board to indicate in its decision what weight, if any, it

had in fact ascribed to the factum. Having failed to refer to the evidence in its decision, the Board erred and its decision was set aside.

*Fajardo v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 113, 157 N.R. 392 (Fed. C.A.).

The applicant's claim for refugee status was denied. The applicants, a mother and her daughter, had put forward a fear of persecution based on perceived political opinion and as a result of a son's alleged membership in a guerilla group and the mother's being a teacher and a member of the teachers' union and her having given involuntary support to the guerrilla group when it occupied the area where they were living. The son had been previously determined to have a credible basis for his claim under the Refugee Claimant Designated Class Regulations. The mother's story was not accepted. Her evidence was corroborated in part by the affidavit of a nun, the principal at the school where she had taught prior to fleeing El Salvador. There was no suggestion that the nun's credibility was in question. The nun's affidavit attested to incidents of which the mother had testified. The nun was not available for cross-examination and therefore the tribunal gave very little weight to her evidence. The Court noted that by section 68(3) of the Immigration Act, the Refugee Division is not bound by legal or technical rules of evidence and may base a decision on evidence considered credible and trustworthy. The suggestion that the affidavit of a patently respectable deponent as to facts within her knowledge should be discounted because, in the very nature of the process, the deponent was not available to be cross-examined, was wrong. The Refugee Division must not impose on itself or claimants evidentiary fetters of which Parliament has freed them.

The appeal was allowed, in part for this reason, and the decision of the Refugee Division set aside.

*Aquino v. Canada (Min. of Employment & Immigration)* (1992), 144 N.R. 315 (Fed. C.A.).

The appellant claimed to be a Convention refugee. The Convention Refugee Determination Division (CRDD) dismissed the appellant's claim and made adverse findings as to the appellant's credibility.

The appellant objected to the quality of the interpretation the interpreter provided during the hearing. The transcript indicated that the appellant had appeared to answer some questions without waiting for translation and the panel member interrupted the interpreter on several occasions to correct the translation. Further, the appellant's counsel did not object to the interpretation during the hearing. Accordingly, this objection to the quality of the interpretation was not a ground upon which the appeal could succeed.

The PIF form was not identified on the record nor entered as an exhibit, although it was clearly on the table at the hearing and referred to in some of the questions. It was the perceived inconsistencies between the PIF and the appellant's testimony which formed a basis for the finding that the appellant was not credible. These inconsistencies were not put to the appellant at the hearing.

The PIF is a document required to be filed by every Convention refugee claimant. It is among the material an adjudicator is required to file with the registry of the CRDD when a claim is referred there. It is not a document which may be judicially noticed or which any legislative provision deems to be evidence in a proceeding before the

Division. Accordingly, the PIF cannot in the present circumstances be found to be "evidence adduced in the proceedings" within section 68(3). Thus, the CRDD erred in law in basing findings of credibility on perceived discrepancies between the PIF, which was not in evidence, and the appellant's *viva voce* evidence. The decision of the CRDD was set aside and the matter remitted for rehearing by a differently constituted panel.

*Mahendran v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 30, 134 N.R. 316 (Fed. C.A.).

Members of the Refugee Division of the Immigration and Refugee Board are enabled to examine any person on oath. If a board member has problems with testimony, he or she is entitled to conduct questioning of the appellant in the proper discharge of his or her duties. The nature of the questioning, however, can be examined to determine whether there is merit to the submission that a member of the tribunal assumed the role of prosecutor and crossed the line between acceptable conduct and unacceptable conduct for members of the quasi-judicial body. The Court expressed concern at the lengthy nature of the cross examination in this case and noted that it would have been preferable for the board member to have left the main burden of questioning the appellant to the refugee hearing officer. There was, however, no basis for allowing an appeal from the Refugee Division decision that the appellant was not a convention refugee. A further objection was made about the admissibility of a photocopy of a telex. The Court noted that the scheme of the Act and Regulations leaves it to the tribunal to decide the weight which it will ascribe to any of the evidence before it. Here there was other cogent evidence which supported the Board's negative findings on credibility and this ground of appeal was for that reason also unsuccessful.

#### *Subsection (4)*

*Aquino v. Canada (Min. of Employment & Immigration)* (1992), 144 N.R. 315 (Fed. C.A.).

For digest, see section 68, subheading *Subsection (3)*, *supra*.

*Tung v. Canada (Min. of Employment & Immigration)* (1991), 124 N.R. 388 (Fed. C.A.).

This was an appeal from the Refugee Division of the Immigration and Refugee Board. While there is no statutory requirement for keeping a complete record of the proceedings before the Refugee Division, the Board has a policy of recording those proceedings on tape and making a full transcript available for possible use on an appeal. The Board's policy was not implemented in this case and disadvantage accrued to the appellant. It is no answer to say that the recording equipment broke down through no fault of the Board's. The quality of interpretation was found wanting. The appellant was entitled, through the interpreter, to tell the story of his fear in his own language, as well as he might have done had he been able to communicate to the Board in the English language (the language of this hearing). The failure to provide an adequate interpreter prejudiced the appellant in the proceedings before the Refugee Division and before the Court of Appeal, who were required to review important aspects of the Board's decision on a deficient record.

The Refugee Division found that the appellant's failure to claim "asylum" in any



of the countries he visited en route to Canada was inconsistent with the conduct of a person who fears for his life. There was no evidence that any of the countries the appellant visited had ratified the 1951 U.N. convention and the 1967 protocol or that they had adopted laws implementing those instruments. The Board is authorized under section 68(2) to take notice of any facts that may be judicially noticed. It is wrong for the Board to speculate that refugee protection was available in the countries that the appellant stopped in (Hong Kong, Thailand, Bolivia and Peru). The Court noted that the appellant was at all times in transit to Canada and had already decided to claim refugee status after he arrived here. The Court noted that the Board is normally required to give detailed reasons for disbelieving a claimant. The absence of such reasons may suggest that the Board had no overriding concern with the appellant's credibility. There was no expressed or implied rejection of the appellant's credibility as a witness on his own behalf. The Refugee Division decision betrayed a possible confusion as to the proper test. The Refugee Division members said that they were not convinced that the motivation behind the client's fleeing China was fear. The Court noted that the issue at this point was the well-foundedness of the appellant's fear and that the words used introduced the subjective element into a test, which at that stage was entirely objective.

### *Subsection (5)*

*Garcia v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 220.

The applicant sought judicial review of a negative decision of the Refugee Division. The applicant based his claim to status on a reasonable fear of persecution because of his political opinion and membership in a particular social group. During the applicant's testimony, the question of a change of circumstances in El Salvador was raised, and several documents were introduced which referred to the peace accords between the guerrilla forces and the government authorities. Counsel for the applicant stated her intention to make submissions on this point during argument, which she did. When the evidence had been completed and argument heard, the members of the Refugee Division withdrew for about thirty minutes, planning to render a decision the same day. Subsequent to the adjournment, the tribunal returned and entered a document, which it had obtained, as an exhibit. By seeking out documents when the hearing was over and argument had been heard and entering this exhibit in evidence without giving the applicant an opportunity to make submissions, the Refugee Division acted contrary to the mandatory provisions of sections 68(5) and 69.1(5).

*Salinas v. Canada (Min. of Employment & Immigration)*, 17 Imm. L.R. (2d) 118, 6 Admin. L.R. (2d) 154, 93 D.L.R. (4th) 631, 142 N.R. 211, [1992] 3 F.C. 247, 57 F.T.R. 159n (C.A.).

This was an appeal from an order of the Trial Division whereby a decision of the Refugee Division to reconvene a hearing into the respondent's claim for refugee status was quashed and the Refugee Division ordered to render a decision on the basis of the evidence before it. The basis of the respondent's claim was her fear of persecution by agents of the state of Panama, which was headed by General Noriega. Some time after the conclusion of the respondent's hearing, but before a decision was rendered, the political situation in Panama changed. The presiding member of the panel notified the respondent

that the hearing would be reconvened for the purpose of hearing evidence on these recent changes.

The appeal was allowed. The Refugee Division did not exceed its jurisdiction in reconvening the hearing. Section 68 endows the Refugee Division with powers and duties in relation to any proceedings before it. The distinction has been drawn by Parliament between “proceedings” and a “hearing” before the Refugee Division. The hearing is to be conducted in a manner required by section 69.1. The “hearing” is a step in any proceedings. “Proceedings” is a wider term encompassing the entire matter before the Refugee Division including the hearing itself. The Minister, pursuant to section 69.2(1), is able to initiate proceedings for a determination whether any person who was determined to be a Convention refugee has ceased to be so. The Court found force in the argument that evidence as to the change of conditions is better addressed in the same proceedings rather than in new proceedings initiated by the Minister subsequent to the Refugee Division’s determination.

The Refugee Division was not *functus officio*. It had yet to make a determination of the claim. Until it did, the proceedings were pending and finality had not been reached. In order to arrive at its decision, the Refugee Division could exercise the power conferred by the statute, provided it did so properly by giving the respondent an opportunity to be heard at the reconvened hearing. An inquiry into any change of conditions in the appellant’s homeland comes within the general mandate of the Refugee Division in determining the claim.

In *Lawal v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 404, the Court ruled that the only way for the Refugee Division, after the end of a hearing but before decision, to consider new evidence beyond that of which it might take judicial notice was by reopening the hearing. The Court’s decision in *Longia v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 288, applies only where the Refugee Division has already reached a decision.

The appeal was allowed. The order of the Trial Division was set aside and the respondent’s claim for refugee status was referred back to the Refugee Division for a continuation of the reconvened hearing.

### **POWER OF REFUGEE HEARING OFFICER.**

**68.1** A refugee hearing officer who is appointed under subsection 64(3) may, in accordance with rules made under subsection 65(1) governing the activities of the Refugee Division, call and question any person who claims to be a Convention refugee and any other witnesses, present documents and make representations. 1992, c. 49, s. 58.

*RIGHT TO COUNSEL — Confidentiality — Idem — Idem — United Nations High Commissioner for Refugees — Representation — Honorarium and expenses — Adjournments — Presiding member where proceedings adjourned.*

**69. (1)** In any proceedings before the Refugee Division, the Minister may be represented at the proceedings by counsel or an agent and the person who is the subject of the proceedings may, at that person’s own expense, be represented by a barrister or solicitor or other counsel.

(2) Subject to subsections (3) and (3.1), proceedings before the Refugee Division shall be held in the presence of the person who is the subject of the proceedings, wherever practicable, and be conducted *in camera* or, if an application therefor is made, in public.

(3) Where the Refugee Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of any of its proceedings being held in public, it may, on application therefor, take such measures and make such order as it considers necessary to ensure the confidentiality of the proceedings.

(3.1) Where the Refugee Division considers it appropriate to do so, it may take such measures and make such order as it considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (3).

(3.2) Notwithstanding subsection (2) or any measure taken or order made pursuant to subsection (3) or (3.1), the Refugee Division shall allow any representative or agent of the United Nations High Commissioner for Refugees to attend any proceedings before it as an observer.

(4) Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age or is unable, in the opinion of the Division, to appreciate the nature of the proceedings, the Division shall designate another person to represent that person in the proceedings.

(5) A person who is designated pursuant to subsection (4) to represent a person in proceedings before the Refugee Division shall be paid such honorarium as is fixed by the Chairperson and such reasonable expenses as are incurred by the designated person in connection with the representation, unless the designated person is the parent or guardian of the person represented.

(6) The Refugee Division shall not adjourn any proceedings before it, unless it is satisfied that an adjournment would not unreasonably impede the proceedings.

(7) Proceedings before the Refugee Division that are adjourned may be resumed before any member or members of the Refugee Division other than the member or members who presided at the adjourned proceedings if the person who is the subject of the proceedings and the Minister, if taking part in the proceedings, consent thereto or if no substantive evidence was adduced before the adjournment. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 59.

*Uppal v. Canada (Secretary of State)* (1994), 72 F.T.R. 207.

The applicant was a Sikh from the Punjab and a citizen of India who had made a claim for refugee status. The applicant sought to quash the decision, in part on the



basis that he was not told by the Refugee Division that his counsel was not a barrister or solicitor. There is no absolute right to legal representation in matters before the Board. The applicant was represented throughout by an immigration consultant. No significant issue was taken with the nature of the representation provided. The applicant filed an affidavit expressing displeasure with the fact that his consultant was not a lawyer who could represent him on his appeal. Nevertheless, the applicant was clearly represented by counsel within the meaning of the Immigration Act.

The application for judicial review was dismissed.

*Afrane v. Canada (Min. of Employment & Immigration)* (1993), 14 Admin. L.R. (2d) 201, 20 Imm. L.R. (2d) 312, 64 F.T.R. 1.

This was an application for judicial review to quash an exclusion order. The issue was whether the applicant had been denied the right to counsel by reason of the adjudicator refusing an adjournment.

The applicant and his counsel had agreed to proceed on December 16, 1992 with a resumption of the applicant's inquiry. Subsequent to agreeing to this date, the applicant retained new counsel and on December 16 the applicant attended with a letter from his new counsel, which letter indicated that the applicant's new counsel was unable to attend on December 16 and suggested dates in January to resume the inquiry. The adjudicator refused the adjournment.

This decision reviewed a number of cases dealing with the right to counsel. The Court noted that the refusal to adjourn so that counsel might attend has been upheld on appeal where there were enumerable adjournments and attempts to agree on dates to proceed and where the hearing to proceed was scheduled peremptorily.

The Court noted that there was no suggestion that the applicant or his counsel had deliberately attempted to delay the process and further that the resumption of the inquiry had not been scheduled peremptorily. Further, counsel's request to adjourn the December 16 proceeding was the first adjournment requested.

Accordingly, the exclusion order was quashed and the matter was returned to a new adjudicator for resumption of the applicant's inquiry.

The Court observed that normally the material in a case of this type should contain a candid and full explanation of the circumstances. On this record there was no indication when the applicant's present counsel was retained and no cogent reason given why counsel did not communicate with the respondent in advance of December 16, 1992 to indicate his unavailability and to discuss alternative dates. Further, the Court noted that it was preferable for some description of the prejudice suffered by the applicant to be described in the materials in support of the application. The Court observed that the right to be represented by counsel is not an absolute right. It is predicated on the parties and counsel acting reasonably in all the circumstances.

### ***Subsection (7)***

*Hernandez v. Canada (Min. of Employment & Immigration)* (1993), 162 N.R. 391 (Fed. C.A.).

The appellant's hearing began in October, 1989. The Refugee Division received the pertinent documentary evidence, including the appellant's personal information form (PIF). The appellant was sworn and attested to corrections to the PIF. A question arose

as to why this claim was not being processed under the Refugee Claimants Designated Class Regulations and the hearing was adjourned. A differently constituted panel was present when the hearing reconvened. The appellant refused to consent and objected to the matter proceeding. The panel decided to proceed *de novo*. The documentary evidence was introduced afresh. Section 69(7) governs the resumption or continuation of a hearing. It does not preclude the constitution of a hearing *de novo*. Had the panel, in the face of the appellant's objection, simply carried on from the point of the adjournment, it would have run afoul of section 69(7). It did not and accordingly there was no merit in the appeal.

**HEARING INTO REFUGEE CLAIMS — *Idem* — Notice of hearing — Opportunity to be heard — Abandonment of claim — Quorum — Acceptance of claim without hearing — Exception — Decision — Where no credible basis for claim — Split decision — *Idem* — Written reasons.**

69.1 (1) Subject to subsection (2), where a person's claim to be a Convention refugee is referred to the Refugee Division pursuant to section 46.02 or 46.03, the Division shall, as soon as practicable, commence a hearing into the claim.

(2) Where a person's claim to be a Convention refugee is referred to the Refugee Division pursuant to section 46.02 or 46.03, the Division shall, if the Minister so requests in writing at the time of the referral, provide the Minister with the information referred to in subsection 46.03(2) and, as soon as is practicable after the expiration of the period referred to in subsection (7.1), commence a hearing into the claim.

(3) The Refugee Division shall notify the person who claims to be a Convention refugee and the Minister in writing of the time and place set for the hearing into the claim.

(4) [Repealed 1992, c. 49, s. 60.]

(5) At the hearing into a person's claim to be a Convention refugee, the Refugee Division

(a) shall give

(i) the person a reasonable opportunity to present evidence, question witnesses and make representations, and

(ii) the Minister a reasonable opportunity to present evidence and, if the Minister notifies the Refugee Division that the Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of this Act are raised by the claim, to question the person making the claim and other witnesses and make representations; and

(b) may, if it considers it appropriate to do so, give the Minister a reasonable opportunity to question the person making the claim and any other witnesses and to make representation concerning the claim.

(6) Where a person who claims to be a Convention refugee

(a) fails to appear at the time and place set by the Refugee Division for the hearing into the claim,

(b) fails to provide the Refugee Division with the information referred to in subsection 46.03(2), or

(c) in the opinion of the Division, is otherwise in default in the prosecution of the claim,

the Refugee Division may, after giving the person a reasonable opportunity to be heard, declare the claim to have been abandoned and, where it does so, the Refugee Division shall send a written notice of its decision to the person and to the Minister.

(7) Subject to subsection (8), two members constitute a quorum of the Refugee Division for the purposes of a hearing under this section.

(7.1) Notwithstanding subsections (1) and (2), where the Minister does not, at any time within the period prescribed by rules made under subsection 65(1), notify the Refugee Division that the Minister intends to participate in accordance with subsection (5) at any hearing into a person's claim to be a Convention refugee, a member of the Refugee Division may, in accordance with any rules made under paragraph 65(1)(d), determine that the person is a Convention refugee without a hearing into the matter.

(8) One member of the Refugee Division may hear and determine a claim under this section if the person making the claim consents thereto, and the provisions of this Part apply in respect of a member so acting as they apply in respect of the Refugee Division, and the disposition of the claim by the member shall be deemed to be the disposition of the Refugee Division.

(9) The Refugee Division shall determine whether or not the person referred to in subsection (1) is a Convention refugee and shall render its decision as soon as possible after completion of the hearing and send a written notice of the decision to the person and to the Minister.

(9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

(10) Subject to subsection (10.1), in the event of a split decision, the decision favourable to the person who claims to be a Convention refugee shall be deemed to be the decision of the Refugee Division.

(10.1) Where, with respect to any person who claims to be a Convention refugee, both members of the Refugee Division hearing the claim are satisfied



- (a) that there are reasonable grounds to believe that the person, without valid reason, has destroyed or disposed of identity documents that were in the person's possession,
- (b) that the person has, since making the claim, visited the country that the person claims to have left, or outside of which the person claims to have remained, by reason of fear of persecution, or
- (c) that the country that the person claims to have left, or outside of which the person claims to have remained, by reason of fear of persecution is a country that is prescribed under paragraph 114(1)(s.1) to be a country that respects human rights,

then, in the event of a split decision on the claim, the decision not favourable to the person shall be deemed to be the decision of the Refugee Division.

(11) The Refugee Division may give written reasons for its decision on a claim, except that

- (a) if the decision is against the person making the claim, the Division shall, with the written notice of the decision referred to in subsection (9), give written reasons with the decision; and
- (b) if the Minister or the person making the claim requests written reasons within ten days after the day on which the Minister or the person is notified of the decision, the Division shall forthwith give written reasons. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 60.

(12) [Repealed 1992, c. 49, s. 60.]

### *Subsection (5)*

*Wu v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1040-93, April 25, 1994.

The applicant sought judicial review of a negative decision of the CRDD. The applicant raised the issue of whether certain comments made by one panel member gave rise to a reasonable apprehension of bias. The Court concluded that the comments of the panel member did not give rise to a reasonable apprehension of bias. The Court also noted that the issue of bias should have been raised by the applicant when the matter arose before the Board. Bias was not raised at that time nor was it raised by the applicant in her written submissions to the Board at the conclusion of the refugee hearing. Failure to raise the issue would have led the Court to conclude that the applicant had waived her right to raise an objection on this ground in the event that the comments of the panel member had been sufficient to give rise to a reasonable apprehension of bias.

*Kanagasekarampillai v. Canada (Secretary of State)*, Fed. C.A., Doc. No. A-171-91, April 22, 1994.

The appellant, a Tamil and citizen of Sri Lanka, claimed refugee status on the basis of persecution on account of race. When counsel attempted to elicit testimony on re-

examination, he encountered difficulty from the presiding member. The interference with counsel's attempt to re-examine was a denial of natural justice. In the course of cross-examination new events and circumstances may have been brought out to explain, contradict or amplify matters that were raised in-chief. The re-examination can legitimately explore these events and circumstances to explain or qualify them. While the appellant's response under cross-examination may have appeared on the surface to have been exhaustive, that was no reason to deny him an opportunity of testifying on the point in question by way of re-examination. In addition to the common law, the "reasonable opportunity" of presenting evidence which the statute grants to a refugee claimant at a hearing was denied, where a re-examination was improperly restricted.

*Siad v. Canada (Secretary of State)*, Fed. T.D., Doc. No. A-1060-92, April 12, 1994.

This was an application to review a negative decision of the CRDD. The applicant was found to have been excluded from the status of a refugee by article 1.F(a) of the U.N. Convention on Refugees. The claimant was the son of the former President of Somalia, Mohammed Siad Barre, who was deposed in January, 1991. The tribunal found serious reason for considering that the claimant had committed crimes against humanity or acts contrary to the purposes and principles of the U.N. because it concluded that he had in fact been the governor of a notorious prison in Somalia. The claimant denied the fact and the Minister called two witnesses who gave evidence identifying the applicant as the governor.

It is impossible to lay down general rules as to the kind and degree of disclosure which must be required by tribunals of the CRDD. It must always be recognized that tribunals have a wide discretion as to the procedure they adopt and by virtue of section 68(3) of the Immigration Act, the Refugee Division is not bound by traditional rules of evidence.

The tribunal in this case denied a fair hearing to the claimant because of the casual approach it took to the receipt of evidence in support of the Minister's contention that the claimant had been a prison governor. Without laying down any disclosure guidelines, the Court concluded that fairness required that where the Minister was intending to prove that there were serious reasons for considering that the claimant has been guilty of crimes against humanity or acts contrary to the principles of the United Nations, he should make every reasonable effort to provide the claimant's counsel with copies of statements from witnesses or records of interviews with them or at least "will-say" statements. The kind of cursory information given in this case over the telephone was not sufficient. If such disclosure has not been made, the tribunal should not proceed, where the claimant so requests, until it is made. There may be special circumstances, such as those involving national security or the safety of witnesses, where disclosure will have to be restricted. No such circumstances were invoked by the Minister in this case.

The Court had some doubt about the relevancy of the personal information forms of the witnesses, which had been requested by counsel, but made no decision with respect to the requirement that personal information forms be disclosed. Previous statements given by the witnesses in respect of the applicant should have been disclosed and it should have been apparent to the tribunal that fairness required that the applicant be given every reasonable opportunity to prepare for cross-examination of these witnesses. This was especially true because the testimony given under oath by the witnesses was

such that they indicated no first-hand knowledge of the position actually occupied by the applicant. The witnesses had inferred from seeing the applicant in uniform in the area of the prison and from what they were told by others that he was its governor. The tribunal was entitled to receive such evidence but fairness required that the applicant be given a reasonable opportunity to test it through cross-examination.

The other element of unfairness in the proceedings was the use made by the tribunal of an unsworn statement of a university professor as to the role of the applicant. While the tribunal was not bound by the formal rules of evidence, in a situation such as this the tribunal was not acting in accordance with fairness in receiving this unsworn evidence and relying on it. The opinions of the university professor as to who the governor of the prison was were not in the same category as general articles or books which he had written on Somalia, which writings had apparently been referred to in other tribunal hearings. The use of general treatises and articles may well be justified as providing access to generally recognized facts, but the opinions of the professor in this case included statements purportedly identifying this particular applicant as performing a particular role. These statements were not in affidavit form and did not purport to be based on the author's first-hand knowledge. The sources of this information were not identified. In these circumstances it was not appropriate for the tribunal to accept this very critical material as evidence without its author at least being available for cross-examination when the applicant so requested.

The Court could not say that the result reached by the tribunal would have been the same in the absence of these lapses from fairness. Accordingly, the application was allowed and the matter referred back to a differently constituted panel.

*Garcia v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 220.

The applicant sought judicial review of a negative decision of the Refugee Division. The applicant based his claim to status on a reasonable fear of persecution because of his political opinion and membership in a particular social group. During the applicant's testimony, the question of a change of circumstances in El Salvador was raised, and several documents were introduced which referred to the peace accords between the guerrilla forces and the government authorities. Counsel for the applicant stated her intention to make submissions on this point during argument, which she did. When the evidence had been completed and argument heard, the members of the Refugee Division withdrew for about thirty minutes, planning to render a decision the same day. Subsequent to the adjournment, the tribunal returned and entered a document, which it had obtained, as an exhibit. By seeking out documents when the hearing was over and argument had been heard and entering this exhibit in evidence without giving the applicant an opportunity to make submissions, the Refugee Division acted contrary to the mandatory provisions of sections 68(5) and 69.1(5).

*Puerto v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1753-93, February 16, 1994.

The applicant sought to review a negative decision of the CRDD. The Court found that presiding members of the CRDD intervened extensively in the presentation of the applicant's case. Section 69.1(5) requires the CRDD to give the applicant a reasonable opportunity to present evidence. The Court did not find the interferences to be of such a "gross" nature so as to constitute a denial of natural justice. The Court remarked, however, that an opportunity for CRDD members to question applicants arises in the



ordinary course of proceedings and therefore, except in circumstances where it is manifestly evident that intervention in the orderly presentation of an applicant's case is necessary for the effective and efficient management of the hearing, interventions should be reserved by CRDD members to a more appropriate stage of the hearing.

The decision of the CRDD was set aside on the basis of errors in law conceded to by the respondent, involving a misstating and misunderstanding and misconstruing of evidence. The decision was quashed and the matter referred for redetermination before a differently constituted panel.

*Kaler v. Canada (Min. of Employment & Immigration)* (1994), 73 F.T.R. 217.

This application sought to review a negative determination of the applicant's claim to refugee status. The Court commented on the type of notice necessary to an applicant where the issue of an internal flight alternative (IFA) was going to be canvassed. The question should still remain whether the applicant had an ample opportunity to speak to the IFA issue. The Court in *Thirunavukkarasu v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 589, 22 Imm. L.R. (2d) 241, 109 D.L.R. (4th) 682, 163 N.R. 232 (C.A.) did not intend that an applicant, whose counsel was fully capable of addressing and did in fact fully address the issue of an IFA at the hearing, could be able to rely on lack of prior notice. Such a conclusion is too strict a reading of the Court of Appeal's decision in *Thirunavukkarasu v. Canada (Min. of Employment & Immigration)*.

*Shirwa v. Canada (Min. of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 123, 71 F.T.R. 136.

This was an application for judicial review of a decision denying the applicant Convention refugee status. The applicant was a Somali who originally had a lawyer, but on the eve of his hearing the lawyer indicated that he would not be appearing and that a Mr. Gerald Flynn would be representing the applicant at the refugee hearing. The word "counsel" was interpreted to the applicant as "lawyer" even though it transpired later that Mr. Flynn not a member of the Law Society of Upper Canada. The claim for refugee status was denied, despite the fact that the applicant was found to be a credible witness. In *Mathon v. Canada (Min. of Employment & Immigration)* (1989), 28 F.T.R. 217 at 235, 38 Admin. L.R. 193, 9 Imm. L.R. (2d) 132, the Court found that section 7 of the Charter of Rights and Freedoms included the right to be represented by competent and careful counsel. The standard of care is described in *Central & Eastern Trust Company v. Rafuse*, [1986] 2 S.C.R. 147 at 208, 31 D.L.R. (4th) 481, 69 N.R. 321, varied [1988] 1 S.C.R. 1206 which decision indicates that a solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service he has undertaken. The incompetence of counsel in the context of a refugee hearing provides grounds for review on the basis of a breach of natural justice. In circumstances where a hearing occurs, the decision of the tribunal can only be reviewed in extraordinary circumstances, where there is sufficient evidence to establish the exact dimensions of the problem and where the review is based on a precise factual foundation. Where the incompetence or negligence of the applicant's representation is sufficiently specific and clearly supported by the evidence, such negligence or incompetence is inherently prejudicial and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.

The circumstances here warranted overturning the decision. The fact that Mr. Flynn

was not a lawyer did not provide a basis for review. However, there was sufficient evidence in the record to support the applicant's allegation that:

1. Mr. Flynn led the applicant to believe that he was a lawyer and that this misrepresentation was not corrected at the hearing.
2. Mr. Flynn was negligent in his representation of the applicant.
3. No proper explanation for failing to fulfil the responsibility to provide written submissions on the issues of credibility or change of circumstances was provided. This was particularly important in light of the tribunal's finding that the applicant was a credible witness.

Accordingly, the decision was overturned.

*Liyanagamage v. Canada (Secretary of State)* (1993), 71 F.T.R. 67.

In this application to review a decision denying refugee status, the issue was whether the Board failed to observe a principle of natural justice or procedural fairness by not giving the applicant an opportunity to reply to new case law. The failure to provide the parties an opportunity to deal with new case law is a matter which, in the circumstances of this case, was contrary to procedural fairness. There may be cases where there would not be denial of procedural fairness when a Board relied on a case decided after the hearing and submissions were completed, but before the Board rendered its decision. In the context of this case the decision denying refugee status was set aside.

*Iossifov v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 28.

On this application to review a decision of the CRDD refusing refugee status the Court found that the Board members were not interested in evidence of past persecution, constantly interrupted the applicant in the presentation of his case and prevented counsel from proceeding in an orderly fashion. This conduct was found to be a breach of natural justice. It was no answer to say that the Board allowed the applicant ultimately to put into evidence all evidence relating to past persecution when it was clear from the transcript that the Board members were not interested. The well-foundedness of the fear of future persecution could not be decided without determining if there was past persecution.

*Gonzales v. Canada (Secretary of State)* (1993), 71 F.T.R. 26.

The applicant sought judicial review of a decision refusing refugee status. Counsel complained that there was an apprehension of bias because one of the two members of the tribunal presided at the hearing of the applicant's daughter. The daughter's claim was found not to be credible. The Court found no evidence indicating a predisposition by any members of the tribunal as to the issue to be decided at this refugee hearing. In and of itself, the fact that a member happened to preside over the claim of the applicant's daughter was insufficient to raise a reasonable apprehension of bias. Furthermore, the Court noted that counsel for the applicant, at the hearing, was given a copy of the decision in the daughter's case before the hearing began and did not raise the question of bias until the second day of the hearing. The application was dismissed.

*Singh v. Canada (Min. of Employment & Immigration)* (1993), 69 F.T.R. 142.

The applicants sought to set aside a decision that they were not Convention refugees. This case discusses how findings on the evidence can be successfully challenged in the Trial Division.

The Court commented that section 18.1(4)(d) of the Federal Court Act set out disjunctive conditions under which a decision will be set aside. For purposes of paragraph (c) of that section, the Court noted that findings of fact which are unsupported by adequate evidence are errors in law — the so-called “no evidence rule”. Section 18.1(4)(d) allows the Court to set aside a decision which is made “without regard for the material before it”. This grants a broader right of review than the traditional “no evidence” test. It compels the setting aside of tribunal decisions where they are unreasonable. The phrase “perverse or capricious manner or without regard for the material before it” is accurately discussed in J.A. Kavanagh, *A Guide to Judicial Review* (1978) at 57-58.

The findings of fact can be divided into two classifications: findings of primary facts and inferences of fact which are drawn from the primary facts. Courts are reluctant to interfere with findings of primary facts made by tribunals. In areas where a tribunal has a particular expertise in drawing inferences, courts are inclined to treat those inferences with deference. If, however, the inference is of a type which is based on common experience, then the court is in equally as good a position as the tribunal to draw the inference and in that case deference is not shown.

In this particular case, the inferences of fact drawn by the Board did not stand up upon a review of the evidence and the decision refusing refugee status was set aside.

*Nrecaj v. Canada (Min. of Employment & Immigration)*, 65 F.T.R. 171, [1993] 3 F.C. 630, 14 Admin. L.R. (2d) 161, 20 Imm. L.R. (2d) 252.

This was an application for judicial review of a decision of the CRDD determining that the applicant was not a Convention refugee. The applicant was a citizen of Yugoslavia. He was convicted in Canada of assault with a weapon, uttering a threat and aggravated assault and received a sentence of three years in custody in July, 1991. These convictions followed upon earlier convictions in both Yugoslavia and Italy. The CRDD concluded that the applicant's evidence was not credible or trustworthy.

Following his arrival in Canada, the applicant had an extensive interview with the manager of a Canadian Immigration Commission office in British Columbia. The manager made notes of the interview. The manager testified at the refugee hearing and the contradiction between the applicant's *viva voce* testimony before the CRDD and his interview with the manager formed the basis for the adverse finding of credibility. The hearing commenced in May of 1991 and was not concluded until April 13, 1992. On February 17, 1992 counsel for the applicant contacted the refugee hearing officer (RHO) requesting disclosure of any documents, witness statements and evidence in her possession. Disclosure was refused. The Court held that the principles set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 applied to proceedings before a tribunal such as the CRDD. To adequately meet the test of fairness it was decided that the disclosure must be sufficiently timely to allow counsel to fully and effectively fulfil his or her role and to allow the party requesting disclosure to prepare.

It should be noted that the interview notes in question were shared with counsel on April 13, 1992, the last day of the refugee determination proceedings. This disclosure was found to be insufficient to meet the obligation to disclose contemplated by the Court.

*Handal v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-A-6875, June 10, 1993.

This was a judicial review application against the decision of the Refugee Board



holding that the applicants were not Convention refugees. At the opening of the hearing the Board made reference to findings by a differently constituted panel hearing the case of the claimant's husband. The Board ruled that it had no jurisdiction to review that decision in the context of hearing the applicant's refugee claim. The decision of the Board was set aside. Each applicant must have his claim determined individually and must have the opportunity to present his case. The applicant had not agreed to be bound by the findings made by the Board in her husband's case. Accordingly, the conduct of the Board in being bound by those findings was not justified. The decision of the Board was quashed and the matter remitted back to a differently constituted Board.

*Seth v. Canada (Min. of Employment & Immigration)*, 20 Imm. L.R. (2d) 271, [1993] 3 F.C. 348, 155 N.R. 67, 105 D.L.R. (4th) 365.

This application for judicial review raised the issue of the right of a Convention refugee claimant to seek an adjournment of his claim pending the determination of outstanding criminal charges laid after his arrival in Canada.

Accordingly, the Court ruled that the adjudicator did not commit any reviewable error in the exercise of his discretion when he decided not to adjourn the credible basis hearing until the criminal charges were concluded. The credible basis hearing was not so devoid of any legitimate public purpose that to allow it to take place would constitute an injustice and might offend the basic sense of fairness which underlies the principles of fundamental justice. Further, the credible basis inquiry was not designed to assist in the prosecution of the witness. It would require exceptional circumstances to stay the proceedings of an administrative tribunal, whose functions, powers and decisions have absolutely nothing to do with the criminal liability of the person compelled to testify and offer evidence before it, for the reason that that person, because he was criminally charged, had claimed the right to silence. The state, in this case, was merely engaging itself in a most legitimate process, which is by law to be expeditious, of determining the status of a person who seeks the right to remain in Canada as a refugee.

*Kusi v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 281, 65 F.T.R. 58.

An adjudicator and member of the Immigration and Refugee Board were conducting a credible basis hearing into the claim of a Convention refugee claimant, pursuant to provisions of the Immigration Act in effect on August 19, 1992.

The tribunal accepted as evidence notes taken by an immigration officer, which recorded answers given to him at the port of entry by the applicant. The applicant contested the accuracy of the notes and asked that the officer be produced for cross-examination, a request which was denied by the tribunal.

The decision by the tribunal that there was no credible basis to the applicant's claim was set aside and the matter was remitted back for determination in accordance with the law. Specifically, the Court found that given the importance of the interest, namely the applicant's claim to be a Convention refugee, and given the fact that the applicant contested the accuracy of the notes which were relied upon by the tribunal, the rules of natural justice and of fundamental justice required that the cross-examination, which was sought, be allowed. The Court relied on the jurisprudence in *Canada (Min. of Employment & Immigration) v. Leal* (1991), 129 N.R. 383 (Fed. C.A.) and *Cheung v. Canada (Min. of Employment & Immigration)* (1981), 122 D.L.R. (3d) 41.

*Editor's Note:* Although occurring in the context of a repealed refugee hearing procedure, the principle in this case may have a broader application.

*Pal v. Canada (Min. of Employment & Immigration)* (1993), 70 F.T.R. 289.

The applicant sought review of a decision denying him Convention refugee status.

The applicant was not granted a recess, when he requested one, in order to review documents which were introduced into evidence and which he had not seen previously. The documents were introduced to contradict evidence which he had given. They were written in English. The applicant was testifying through an interpreter. The Court found that in refusing to allow the applicant and his counsel an opportunity to review the evidence, the applicant was denied the opportunity to answer the case against him and a breach of natural justice occurred.

The Court pointed out that relief under section 18.1(4) of the Federal Court Act is discretionary and thus, if no prejudice is caused by an erroneous procedure or decision, an order quashing that decision will not normally be given. If no real purpose will be served by requiring another hearing, one will not be ordered.

The Court was unable to conclude that the breach of natural justice which occurred in the context of this case was minor and could not appreciably affect the final decision. The breach was not cured by subsequent actions and accordingly, the decision of the tribunal was quashed.

*Sivaguru v. Canada (Min. of Employment & Immigration)* (1992), 16 Imm. L.R. (2d) 85 (Fed. C.A.).

The appellant testified that he was a supporter or member of a Tamil organization known as LTTE. He said he was unaware of any violence engaged in by the LTTE between 1979 and 1983. A Board member hearing the evidence initiated on his own a request for information from the Board's documentation centre on the violent activities of the LTTE. After obtaining the information and without disclosing it to the Refugee Hearing Officer or counsel, the Board member then questioned the appellant and contradicted him with the information.

The appellant testified that he had been warned about the particular member in question and had been warned not to tell him the truth about any violent activities of the LTTE or risk being classified as a terrorist and not allowed to remain in Canada.

The Immigration and Refugee Board does not possess the powers of the Court. Its members are not judges. They are not bound by any legal or technical rules of evidence. They are required to deal with all proceedings as informally and expeditiously as the circumstances and the considerations of fairness permit.

An essential requirement for such a hearing is that the Board act with impartiality. Impartiality refers to a state of mind or attitude. It connotes an absence of bias, actual or perceived. For a "hearing" to be worthy of the description the Board must be willing to give the evidence the dispassionate and impartial consideration it requires in order to arrive at the truth. The difficulty in getting at the full story is recognized by the nature of powers which are conferred by subsections 67(2) and 68(4). The flexible provisions of the latter subsection permit the Board to take judicial notice of facts and to take notice of other facts, information and opinion within its specialized knowledge provided it does so in the manner authorized by the statute. The Act does not permit a member of the Board to embark upon a quest for evidence in the manner which was adopted in this case. That method of proceeding subverts its function as an impartial tribunal

regardless of the legitimate concern which motivated the request. The search for evidence was secretly initiated and the tenor of the questions put after the information was acquired suggested that the information was going to be used to devastating effect. The Board member might have openly revealed his misgivings about the evidence at the hearing where a course of action known to all concerned could have been decided upon and initiated. Accordingly, the appeal was allowed, the decision of the Board set aside, and the matter referred back for rehearing and redetermination by a differently constituted panel of the Refugee Division.

*Yusuf v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 629, (*sub nom. Yusuf v. Ministre de l'emploi et de l'immigration*) 133 N.R. 391 (C.A.).

There is no doubt that members of the Refugee Division have the right to cross-examine witnesses they hear. In determining whether the limits had been exceeded the Court of Appeal examined the length of the cross-examination and the tone and content of the questions. In this case the Court found that the comments made by the members of the Board were harassing and unfair. Further, the Court found that the observations by one member of the Refugee Division were sexist, unwarranted, and highly irrelevant. The Court noted that a judge who indulges in that loses his cloak of impartiality and his decision cannot stand. The appeal was allowed, the decision denying refugee status was set aside, and the matter was referred back to another quorum of the Refugee Division.

### **Subsection (9)**

*Costa v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2678-93, May 13, 1994.

The applicants were from Uruguay and appealed a negative determination of their refugee claim. The tribunal's finding that the claim was not objectively based was the subject matter of the judicial review application. The decision of the tribunal was set aside. The analysis of the documentary evidence by the tribunal was deficient. The tribunal referred to only two sources: the U.S. Country Reports and the "Response to Information Request" made by the CRDD. It is not the Court's task to substitute its opinion of the weight to be accorded the documentary evidence that was before the tribunal. The tribunal simply cited documentary evidence in favour of its conclusion that the circumstances in Uruguay were such as to reduce or eliminate the risk of persecution to the applicants. This left the Court in doubt as to whether the tribunal had taken into account the totality of the documentary evidence before it. Accordingly, the decision of the tribunal was set aside.

*Ammery v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-5405-93, May 11, 1994.

The applicant, a female citizen of Iran, sought to set aside a negative determination of her refugee claim. The applicant, in her evidence before the tribunal, claimed that she and other members of her family were being harassed and persecuted because of the activities of her step-father. Even though it appeared that the tribunal erred in its consideration of the meaning of the word "persecution", the Court would not have intervened if the tribunal's assessment of the evidence was made by proceeding with



a careful analysis of the evidence adduced and a proper balancing of the various elements contained in that evidence. This did not happen in this case and thus the decision of the tribunal could not stand on that basis alone.

The tribunal also suggested that there was no documentary evidence to suggest that Iranian citizens were persecuted by their government because of their relatives' anti-government activities. This conclusion was not correct; there were two references in the documentary evidence on this question. However, notwithstanding that fact, the Court was of the view that where there is evidence of the applicant accepted as credible by the tribunal, even the absence of documentary evidence that would support it is not a ground for concluding that the applicant failed to establish good grounds for a fear of persecution.

*Villacorta v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-6042-93, May 10, 1994.

The applicant from El Salvador sought to quash a negative decision of the CRDD.

The first kind of relief sought was an order directing a particular determination by the CRDD, namely that the applicant was a Convention refugee. If, as a result of judicial review proceedings, the Court finds an error of the sort set out in section 18.1(4) of the Federal Court Act, it may set aside the impugned decision, but it has no authority to make a determination or to order that a particular determination be made on the refugee status of a claimant.

The fact that the tribunal did not refer to all documentary evidence that would raise questions about or would support its conclusion was not fatal to its decision. The decision made reference to documentary evidence not supportive of its conclusion that conditions in El Salvador had changed sufficiently to remove the basis for a well-founded fear and thus the decision could not be said to be perverse or capricious or without regard to the evidence.

*Singh v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1409-92, May 4, 1994.

The applicant, a Sikh and a citizen of India, sought to review a negative determination of his refugee claim. The question was whether the panel correctly determined that the applicant had an internal flight alternative. In a contentious case, in which there is seriously conflicting evidence, the tribunal should not rely on one piece of general documentary evidence to arrive at its conclusion on this question to the exclusion of other evidence about the particular circumstances of the applicant. Where there is no conflicting evidence and no evidence at all about the applicant's personal circumstances, the Board does not err when it refers to evidence in support of its conclusion in a summary manner.

*Pouranfar v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-914-93, May 3, 1994.

The applicant, a citizen of Iran, sought judicial review of a negative decision of the CRDD. The application was unsuccessful.

The applicant's counsel sought to persuade the Court that if a decision about a lack of credibility was based on implausibilities, the Court should be more inclined to substitute its judgment for that of the Board than if the decision was based on internal inconsistencies or the demeanour of the witness. Two different tests do not exist. It may

be easier to have a finding of implausibility reviewed where it results from inferences than to have a finding of non-credibility reviewed where it results from the conduct of the witness and from inconsistencies in the testimony. In saying this, the Court did not exclude the issue of the plausibility of an account from the Board's field of expertise, nor did it lay down a different test for intervention, depending on whether the issue is plausibility or credibility. The Refugee Division is a specialized tribunal and has complete jurisdiction to determine the plausibility of testimony and, as long as the inferences drawn are not so unreasonable as to warrant intervention, the findings are not open to judicial review.

*Flores v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2591-93, April 22, 1994.

The applicant claimed refugee status alleging a well-founded fear of persecution by reason of her political opinion. The principal applicant's father was a sergeant in the Presidential Guard under the Somoza regime in Nicaragua. When the Sandinistas assumed power in 1979, the principal applicant's father was arrested, detained and mistreated. The principal applicant's family was identified as espousing policies and a philosophy not in accord with those of the Sandinistas. The family were harassed in a variety of ways between 1983 and 1991.

On the question of changed country circumstances, the CRDD erred in not conducting an adequate analysis of the conflicting documentary evidence and then in not turning, in any significant way, to an evaluation of the changes against the particular circumstances of the applicant.

Having reached a conclusion on the issue of changed country conditions, the CRDD went on to state that it was "not satisfied that the principal applicant would be persecuted by reason of her perceived political opinion or the overlapping ground of membership in a particular social group, namely an anti-Sandinista family, were she to return to Nicaragua." In addition, the panel indicated that it was not persuaded that the applicant, who did not participate in any political or military activities against the Sandinistas, would be at risk of persecution by the Sandinistas now. Neither of these two restatements of the test for Convention refugee status conformed to the *Adjei* test. For both of these reasons the decision of the panel was set aside.

*Alfred v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1466-93, April 7, 1994.

In this application to review a negative decision of the CRDD, the applicant argued that the tribunal erred in misconstruing "persecution" and that the tribunal erred in law by ignoring or misconstruing the evidence before it. The respondent made reference to portions of the transcript of the hearing and to the documentary evidence before the tribunal, which it argued would warrant the conclusion that the findings of the tribunal were reasonable. The Court must review the decision as rendered by the tribunal and not the evidence to which the decision itself makes no reference but which would have warranted the conclusions reached by the tribunal if the tribunal had expressed reasons relying upon such evidence. The simple statement that the tribunal had reached its decision "after careful consideration of all the evidence adduced at the hearing" was not sufficient when the decision made little or no reference to the principal bases of the applicant's

claim. The application was allowed in this case and the matter sent back for rehearing before a differently constituted panel of the CRDD.

*Bogdanov v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1658-92, March 31, 1994.

This was an application to set aside a negative determination of the CRDD. The applicants were all citizens of Bulgaria and the sole ground urged by the applicants was that the tribunal erred in its assessment that the cumulative effects of the various incidents of discrimination and harassment, as reported by the claimants, did not amount to persecution. The testimony of the applicants, according to the tribunal, "seemed credible, appeared to be given in good faith and without exaggeration".

The standard for the Court to intervene is set out in section 18.1(4)(c) and (d) of the Federal Court Act, R.S.C. 1985, c. F-7. The Court must be satisfied that the tribunal "erred in law in making a decision" or "based its decision . . . on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it". The appellants' argument was essentially that the tribunal reached the wrong conclusion in its assessment of the cumulative effect of the evidence. Even if the Court were inclined to share that view, there was no basis for finding that the tribunal's conclusion was unreasonable in law. Further, the tribunal's conclusion that the incidents of harassment did not individually or cumulatively constitute persecution could not be said to be perverse or capricious or made without regard to the material before the tribunal. The conclusion of the tribunal was one open to it on the evidence adduced. Accordingly, the application was dismissed.

*Gholam-Nejad v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2479-93, March 31, 1994.

This application to review a negative decision of the CRDD was based on the denial to the applicant of her right to counsel because of the alleged manifest incompetence of her representative at the Refugee Board hearing. Section 18.1(4) of the Federal Court Act provides for relief where the CRDD acted or failed to act, or failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe, or erred in law, or based its decision or order on an erroneous finding of fact made in a perverse or capricious manner. Nothing on the face of that subsection would authorize the intervention of the Court where the issue is the failure on the part of the applicant's representative, rather than on the part of the CRDD itself. This is particularly true where the failure of the representative was not at all apparent to the CRDD and therefore the representative's failure could not be identified as a failure of the CRDD to ensure natural justice and fairness. Accordingly, this ground of attack could not succeed and the application was dismissed.

*Arumuganathan v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 161.

The applicant was a citizen of Sri Lanka and with her three infant children claimed refugee status on the basis of their race, religion, political opinion and membership in a particular social group. The rejection of the applicant's claims was based on the negative finding of credibility. The tribunal admitted into evidence the Minister's factum from the husband's leave application for judicial review. The husband's claim to Convention



refugee status had been advanced separately from the wife's and had been rejected because it had no credible basis. The refugee hearing officer suggested to the Board that, to the extent that the applicant's claim depended on her husband's experiences, it would not be unreasonable to conclude that if the husband's claim was unsuccessful, her claim was likewise "hollow".

The Board was correct in determining that the Minister's factum could be admitted into evidence and that it was the duty of the Board to assess that evidence and decide what weight to ascribe to it. However, given the inflammatory nature of the evidence it was also incumbent on the Board to indicate in its decision what weight, if any, it had in fact ascribed to the factum. Having failed to refer to the evidence in its decision, the Board erred and its decision was set aside.

*Thurairajah v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2339-93, March 11, 1994.

The applicant, a Tamil from Sri Lanka, sought judicial review of a negative decision of the CRDD. The question of the assessment of a claimant's demeanour during testimony by a tribunal is unassailable on judicial review in the absence of perverseness on the part of the tribunal. The fact that the tribunal does not elaborate on its conclusions is not sufficient to allow the Court to review its finding. Inferences with respect to credibility must be based on the evidence presented; the tribunal cannot make a negative finding while ignoring explanations given by the claimant for apparent inconsistencies.

With respect to the destruction of a passport, the Court relied on the decision in *Attakora v. Canada (Min. of Employment & Immigration)* (1989), 99 N.R. 168 (Fed. C.A.) to the effect that there was nothing inherently incredible in a refugee saying that he had destroyed false travel documents in order to avoid detection and arrest once they had served their purpose. The Court found that the tribunal had made a number of errors that tainted its negative assessment on the issue of credibility and quashed the decision and remitted the matter back to a differently constituted panel.

*Joseph v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2623-93, March 9, 1994.

The Board held that the applicant's fear of persecution was not objectively based. It held that it was difficult to believe that the rapes, which it accepted as true from the applicant's PIF without oral testimony, were connected to the applicant's involvement in, what the Board characterized as a peaceful, religious march. At the outset of the hearing, the Board informed the applicant that she need not testify about the rapes because the Board was accepting them as fact from the applicant's PIF. However, the Board then found that the rapes were not connected to the applicant's involvement in the march and hence her political opinion. Since this was clearly the basis for the negative decision, the applicant should have been given the opportunity to testify as to the rapes and the circumstances. The application for judicial review was approved and the matter referred back to a differently constituted Board.

*Mannan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2892-93, March 8, 1994.

The applicants were a family of Ahmadi Muslims from Pakistan who claimed refugee status based on the harassment and discrimination that they suffered as a result of being

Ahmadi. The Board found that the situation for Ahmadis in Pakistan was improving. It appeared to the Court that the Board did not properly consider all the material before it. It was not necessary for the Board to mention all the documentary evidence. Where, however, there was a large amount of material which contradicted a finding by the Board, that material deserved some comment. Where, as in this case, there was no comment, it was then difficult for the Court to determine if the material had been considered by the Board. Accordingly, the application was allowed and the matter referred back to a differently constituted Board.

*Que v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 154.

The tribunal failed to make reference to the documentary evidence specific to the applicant's claim and to indicate why that evidence was rejected. The Court commented that the Refugee Division is obligated, at the very least, to comment on the information. If the documentation is accepted or rejected, the applicant should be advised of the reasons why, especially as the documentation supports the applicant's position. The decision of the CRDD was set aside.

*Kandiah v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 166.

The tribunal concluded that the evidence did not establish that there was "a good possibility" that all female Tamils of the claimant's age in Colombo, Sri Lanka would be persecuted and therefore rejected her claim to refugee status. Such a statement implied that the tribunal had imposed a higher standard of proof than was required by law. The tribunal's statement may be an error in form, and not intended by the tribunal. Nevertheless it was an error in law which warranted allowing the application and accordingly, the decision of the tribunal was set aside.

*Ezi-Ashi v. Canada (Secretary of State)*, Fed. T.D., Doc. No. IMM-1257-93, February 28, 1994.

The applicant was a citizen of Nigeria and applied for judicial review of a negative determination of his claim for refugee status. The Board drew an adverse inference against the applicant's credibility from the facts surrounding the applicant's plans to leave the country.

Credibility findings can be made in a number of ways. In assessing the reliability of testimony, the Board may consider vagueness, hesitation, inconsistencies, contradictions and demeanour. With respect to these types of credibility findings, the Court normally defers to the Board. Credibility findings may also be based on inferences. When such inferences are made they must be reasonable and based upon the evidence before the Board. When the Court draws a different inference than the Board, this in and of itself is not normally a reason to set aside a decision.

The inferences drawn by the Board were not reasonable. The Board failed to adequately explain why the applicant's plans to leave Nigeria and his delay in claiming refugee status should cast "the ring of untruth" upon his accounts of his arrest and the attacks against him and his property.

The decision of the Board was set aside.

*Dumitru v. Canada (Min. of Employment & Immigration)* (1994), 76 F.T.R. 116.

The applicant based his claim on a fear of persecution because of his political opinion.

He became a member of the Peasant Party and, as a member of that party, took part in demonstrations against the National Salvation Front in Victory Square in Bucharest. The tribunal did not believe that the applicant was recognized by a police officer at one of the demonstrations and that an order was given to a miner to beat up the applicant. Based on that conclusion the tribunal constructed its own hypotheses as to how the events had transpired and used those hypotheses to reject certain essential portions of the applicant's testimony. The tribunal concluded that the applicant had voluntarily decided to confront the miners and that the injuries he suffered resulted from that confrontation and not from an act deliberately committed by a representative of the police.

In setting aside the Board's decision, the Court drew a distinction between reasonable inferences drawn from evidence and pure conjecture. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction it may have the validity of legal proof.

The tribunal drew its conclusions from pure conjecture and this error went to the very essence of its decision. Accordingly, the matter was remitted back to a differently constituted panel for hearing.

*Bovbel v. Canada (Min. of Employment & Immigration)* (1994), 18 Admin. L.R. (2d) 169, 167 N.R. 10, 113 D.L.R. (4th) 415 (Fed. C.A.).

This was an appeal from an order of the Trial Division allowing the respondent's application for judicial review of an Immigration and Refugee Board decision determining that the respondent was not a Convention refugee. The motion judge allowed the application on the grounds that members of the Board were governed by a policy — Reasons Review Policy — the existence of which was sufficient to taint all the decisions rendered by the Board while the policy was in force because it created a reasonable apprehension of lack of independence. If the Reasons Review Policy proscribed a procedure that offended the principles of natural justice, that defect could only affect the validity of decisions rendered in accordance with that procedure. There was no evidence showing that the two members of the Board who disposed of the respondent's claim to refugee status actually followed the policy in the case under review.

The Court went on to conclude that there was nothing wrong with the Reasons Review Policy followed by the Board. The participation of "outsiders" in the decision-making process of an administrative tribunal may sometimes cause a problem. The decisions of the tribunal must indeed be rendered by those on whom Parliament has conferred power to decide and their decisions must, unless the relevant legislation impliedly or expressly provides otherwise, meet the requirements of natural justice. When the procedure followed by members of an administrative tribunal does not violate natural justice and does not infringe on their ability to decide according to their opinion even though it may influence that opinion, it cannot be criticized. That is why the Federal Court of Appeal in *Weerasinge v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 330, 22 Imm. L.R. (2d) 1, 161 N.R. 200, 17 Admin. L.R. (2d) 214 (C.A.) approved of the practice of the IRB having the reasons of its members reviewed by legal advisors before their release.

The fact that the Reasons Review Policy was to be generally applied was not in and of itself objectionable. There is nothing wrong with a legal advisor making his or



her comments known to the other member of the Board who is asked to concur in the reasons being reviewed.

The fact that legal advisors had access to the entire file is not objectionable in the context of the Reasons Review Policy because the legal advisors were not expected to discuss the findings of fact made by the members, but merely, if there was a factual inconsistency in the reasons, to look at the file in order to determine how the inconsistency could be resolved. There is always a possibility that legal advisors, since they were in possession of a file, exceed their mandate and try to influence the factual findings of the Board. However, any policy is susceptible of abuse. Accordingly, the appeal was allowed.

*Sanchez v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 135.

In dismissing the applicant's claim for Convention refugee status, the Board applied the concept of "a reasonable chance of persecution". This concept was found to fall within the parameters of the test as set out in *Adjei v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 680, 7 Imm. L.R. (2d) 169, 57 D.L.R. (4th) 153, 132 N.R. 24 (C.A.) and *Ponniah v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 241, 132 N.R. 32 (Fed. C.A.).

The CRDD does not have to recite or refer to all of the documentary evidence before it in reaching its decision. The fact that it recites some of that documentary evidence makes it clear that it had regard to the documentary evidence. The fact that it recites certain of the documentary evidence and not all of it is not evidence that it has ignored or disregarded the totality of the evidence before it.

This application to set aside a negative determination by the CRDD was dismissed.

*De Yanex v. Canada (Secretary of State)* (1994), 75 F.T.R. 141.

Prior to the date scheduled for the credible basis hearing, counsel for the applicant requested in writing that the respondent Minister provide disclosure of any and all information in the file of the applicant in accordance with the requirement of pre-hearing disclosure and natural justice. No response was received to this request. At the outset of the credible basis hearing, counsel requested an adjournment of the proceedings on the basis that he had not received disclosure. The adjudicator denied the request indicating that the only information required by counsel to conduct the hearing could be obtained from the applicant and therefore the principle of disclosure was academic.

Jurisprudence has established that failure to provide disclosure of relevant information within a reasonable period of time prior to a hearing of a refugee claim on its merits constitutes a breach of the principles of natural justice by denying the claimant the right to a fair hearing. This principle is also extended to the procedures governing credible basis hearings. Accordingly, the decision of the credible basis tribunal was set aside.

*Editor's Note:* Although the provision for the adjudication of refugee claims has changed, the principle in this case may be of more general application.

*Ponce-Yon v. Canada (Min. of Employment & Immigration)* (1994), 73 F.T.R. 317.

The applicant was a student in Guatemala and participated on a number of occasions in anti-government demonstrations. The applicant described incidents that he maintained

amounted to persecution. The Board ruled that the applicant's fear was not objectively well-founded.

The common thread running through the jurisprudence is that inferences based on the degree of a claimant's political involvement are rarely reasonable, particularly in situations where it is acknowledged that the claimant has indeed been persecuted or where the agent of persecution is known to target all members of a particular group, regardless of the extent of their political involvement. The Board accepted that the applicant had been the victim of persecution at the hands of the Guatemalan military. The fact that the applicant's political involvement was only relatively minor cannot therefore be considered relevant in determining if his fear of persecution was reasonable.

The Board accepted that the applicant abandoned his studies and went into hiding because of numerous threats. Given this finding, it was unreasonable for the Board to conclude that the fear of persecution was not well-founded because the applicant did not experience any difficulties during his time in hiding.

The evidence confirmed that the Guatemalan military, and not the civilian government, was the prime agent of persecution. There was uncontradicted evidence that the government did not restrict the foreign travel of its citizens, including its critics. The board therefore erred in relying on the applicant's lack of difficulty in obtaining a passport as a basis for denying his claim.

The negative decision of the Refugee panel was overturned.

*Litvinskii v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2403-93, February 16, 1994.

The applicant, from the Ukraine, claimed refugee status on the ground of a fear of persecution by reason of his origin, his religion, his political opinions and his membership in a particular social group. The Court commented on the difference between discrimination and persecution; the issue being whether the discrimination is serious or systematic enough to be characterized as persecution, or to lead to a conclusion that there was a possibility of persecution in the future. The dividing line is difficult to establish. The identification of persecution behind incidents of discrimination is a question of mixed fact and law. It is for the Board to draw the conclusions in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained in that evidence. There was nothing to justify setting aside the decision of the tribunal that the incidents to which the applicant referred were more in the nature of discrimination than persecution, and the application was dismissed.

*Mohamed v. Canada (Secretary of State)* (1994), 73 F.T.R. 159.

The applicant and her minor daughter sought to review a decision of the Board determining that they were not refugees. The applicant was a citizen of Kenya. The case was heard before the Chairperson of the Board issued guidelines on gender-related persecution. Since the Board had not yet rendered its decision on this matter, counsel for the applicant wrote and requested it to consider the issue of gender-related persecution in light of the evidence adduced at the hearing. Counsel for the respondent submitted that a review of the reasons of the Board indicated that it implicitly addressed the question. Even if the reasons may properly be interpreted in this fashion, this was not a sufficient discharge of the Board's obligation to provide clear reasons on all material issues raised by the applicant. The Board failed to deliver reasons in the case which squarely addressed the issue of gender-related persecution. In addition, the Board either misunderstood or

misapprehended a portion of the evidence on a crucial aspect of the claim. The Board's decision was set aside.

*Cardenas v. Canada (Min. of Employment & Immigration)* (1994), 74 F.T.R. 214.

The applicant was unsuccessful in his claim for refugee status because he was found to have been an accomplice to crimes against humanity. The applicant was from Chile and had an association with the political faction, the Manuel Rodriguez Patriotic Front. In quashing the Board's decision, the Court noted that the Board had made little effort to link the applicant to specific criminal activities. Rather, it chose to refer only in general terms to shootings and bombings. The Board should have endeavoured to carefully detail the criminal acts which it considered the applicant to have committed.

The Board's decision was quashed on this and other grounds.

*Su v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1597-93, January 24, 1994.

This was an application to review a negative determination with respect to a refugee claim. Counsel for the respondent argued that there was evidence on the record that could have led the Board to conclude the applicant's involvement in the pro-democracy movement prior to 1989 was not of such a nature that it would likely result in repercussions leading to persecution in the Convention refugee sense.

The Court's responsibility on a judicial review application is to review the decision in question on the basis on which it was given; in this case, the decision was based on a finding that the applicant was not credible; and not on a finding that even if the story the applicant was telling was true, the facts recounted would not lead to a finding of persecution.

The Court found that the decision that the applicant was not credible was based on a significant misunderstanding of the evidence and quashed the decision.

*Mladenov v. Canada (Min. of Employment & Immigration)* (1994), 74 F.T.R. 161.

The applicant, a native of Bulgaria, concluded his hearing for refugee status in January, 1991. Before a decision was rendered, the applicant received a letter from his parents which contained information regarding a State Security Investigation of the applicant. Counsel forwarded this letter to the Board requesting that it be considered in relation to the decision which was then on reserve. When the decision was rendered, no reference was made by the Board members to the letters received from counsel. One of the letters had relevance to at least two of the three principal reasons relied on by the Board. It was not consistent with the principles of fairness that a decision should stand when it made no reference to relevant evidence proffered in letters submitted before the decision, leaving the applicant and the Court uncertain whether or not the evidence was considered at all. The decision of the Board was set aside.

*Uppal v. Canada (Secretary of State)* (1994), 72 F.T.R. 207.

For digest, see following section 69(1), *supra*.

*Ghassemzadeh v. Canada (Secretary of State)* (1994), 72 F.T.R. 145.

The applicant, who was a citizen of Iran, claimed refugee status. The applicant had unknowingly assisted a member of an anti-government organization. He was arrested, held for five days and released on bail. A short time later he was summoned to appear



before the revolutionary court but he left Iran prior to personally receiving the summons and prior to his court date.

The applicant did not receive a summons directly from the prosecutor's office, but had received it from his family after his departure. The Board had a duty to assess the direct implications of the summons of the revolutionary court on the applicant's objective fear. If the summons was prospective and did not cease to operate, then the Board should have considered the effect of the summons on the applicant's prospective fear of persecution. If the summons was ongoing and affected the objective fear of persecution, then the Board should also have considered the documentary evidence regarding human rights abuses of the revolutionary court in Iran. The tribunal did not consider the impact of the summons in conjunction with the documentary evidence on the objective fear and accordingly, its decision was set aside.

*Rosales v. Canada (Min. of Employment & Immigration)* (1993), 23 Imm. L.R. (2d) 100, 72 F.T.R. 1.

The applicant was a citizen of Guatemala. He was politically active in that country and had unsuccessfully run for political office. The applicant detailed evidence of persecution but his claim was rejected on the basis that political dissent was tolerated in Guatemala and reliance was placed on the United States Department of State Country Report for 1990. The decision of the panel was set aside. The panel justified its rejection of the applicant's assertion that political dissent was not tolerated by a selective and minimal reference to the documentary evidence. The question of whether a panel accepts or does not accept an applicant's assertion is normally left to the panel. But when it arrives at its conclusion by ignoring relevant and apparently overwhelming evidence to the contrary, its decision will not be allowed to stand.

*Iazlovitskaia v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-70-93, November 25, 1993.

The applicant was an ethnic Russian and a citizen of the Ukraine. She based her claim to Convention refugee status on a fear of persecution by reason of her nationality and political opinion. In her Personal Information Form she elaborated on a long series of events, beginning in 1982 and culminating in the termination of her employment as a teacher in 1990.

The test for Convention refugee status is forward looking. The finding that the harassments which the applicant suffered do not amount to persecution is in no way determinative of the issue of whether the applicant has a reasonable fear of persecution if she is required to return to the Ukraine. The fact that the applicant was able to maintain a livelihood and the speculation that she might in the future be able to maintain a livelihood are equally not determinative. Counsel for the respondent sought to support the decision by urging upon the Court inferences that should be drawn from the Board's analysis. However, the Court concluded that a claimant or his counsel and the Court should not have to rely on inferences to support a far-reaching conclusion that a claimant is not a refugee.

*Rosales v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1492-92, October 29, 1993.

The applicant sought to review a negative determination of her claim to refugee

status. The applicant claimed that her brother had been kidnapped by guerrillas and that she had been able to escape. She indicated that strangers had been looking for her since the time of her brother's kidnapping and that she had had to flee the country. The Refugee Division found that her fear of persecution if she returned home was not reasonable.

Counsel for the applicant argued that the Refugee Division had imposed too heavy a burden on the applicant and referred to a sentence in the panel's reasons for decision. The Court dismissed the application and adopted the words of Marceau J.A. in *Lesanu v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-481-92, September 17, 1993:

Clumsiness of language or expression is often understandable, and no consequence must be given to it, provided that on reading the decision as a whole it can be seen that the members of the Board did not go astray in terms of their role or the manner in which it should be carried out.

*Oduro v. Canada (Min. of Employment & Immigration)* (1993), 73 F.T.R. 191.

The determination of change in circumstances in the context of the definition of refugee status is a mixed question of fact and law. Accordingly, the Board needs to provide a sufficient explanation of the facts in order that the reviewing Court may determine if the appropriate legal principles were applied.

*Derbas v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1128-92, August 18, 1993.

The applicant sought to appeal the decision of the IRB that he was not a Convention refugee. The Board indicated to the applicant during the course of the proceeding that he was a credible witness and need not call further evidence. The Board then rejected the applicant's claim on the basis that there was no objective foundation for the expressed fear. The application was dismissed. By accepting the applicant's version of events as fact, the Board was not bound to accept the interpretation he put on those events. The Board still had to look at whether the events, viewed objectively, provided sufficient basis for a well-founded fear of persecution. There was no violation of the requirements of natural justice in this case and the appeal was dismissed.

*Racek v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-38-93, August 17, 1993.

This was an application for judicial review of the decision that the applicant was not a Convention refugee. The reasons for the Board's decision were signed by the two members of the Board who were in attendance at the hearing. The notice of decision signed by the Registrar erroneously identified one member of the Board. The obligation to notify is a formal requirement. The improper designation of a decision maker on the notice of a decision could affect its formal validity if, as a result, the identity of the decision which is the subject of the notice cannot readily be determined. Here, however, a reading of the notice of decision and the reasons for decision indicates that the two members who heard the applicant's claim signed the written reasons, that the conclusions set forth in the written reasons correspond with that of the notice of decision, and that the applicants were provided with a copy of the Board's written reasons. The error in the notice of decision, therefore, does not affect its formal validity.

*Guajardo-Espinoza v. Canada (Min. of Employment & Immigration)* (1993), 101 N.R. 132 (Fed. C.A.).

At the time of the hearing of the appeal, counsel for the appellants relied on the Supreme Court of Canada decision in *Canada v. Ward* and argued that the Refugee Division made an error in not ruling on the appellant's political views or examining the political basis of their claim. The appellant was a police officer and alleged Chilean military authorities assigned him to investigate a theft of equipment on a military base. His investigation, he testified, attributed the theft to lax security measures and this resulted in disciplinary action against the person responsible for security. The security officer was also implicated in the explosion of an electric transformer. The security officer and certain of his friends, including a military judge, were upset with the report and with the appellant for writing it. In the appellant's personal information form was a four-line reference, which the appellant argued in the Court of Appeal constituted a claim for fear of persecution based on political opinion.

The appellants, once the Refugee Division decision has been rendered, cannot change the nature of the argument they made to the tribunal. The Refugee Division cannot be faulted for not deciding an issue that had not been argued and did not emerge perceptibly from the evidence presented as a whole. Saying the contrary would lead to a guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support, to say nothing of frivolous and pointless appeals that would certainly follow.

*Aguebor v. Canada (Min. of Employment & Immigration)* (1993), 160 N.R. 315 (Fed. C.A.).

The Refugee Division did not find the claimant's participation in the coup d'état nor the manner in which he fled the country to be plausible. In dismissing his appeal, the Court sought to put its own decision, *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (Fed. C.A.), in perspective. It may be easier to have a finding of implausibility reviewed where it results from inferences than to have a finding of non-credibility reviewed where it results from the conduct of the witness and from inconsistencies in the testimony. The Refugee Division is a specialized tribunal who has complete jurisdiction to determine the plausibility of testimony and, as long as the inferences drawn by the tribunal are not so unreasonable as to warrant the Court's intervention, its findings are not open to judicial review. In the area of plausibility the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. The *Giron* case in no way reduces the burden that rests on an appellant of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn.

*Ahortor v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 39, 65 F.T.R. 137.

This was an application to review the decision of the CRDD, which denied the applicant Convention refugee status. The CRDD found that crucial aspects of the applicant's evidence were not credible and trustworthy.

The Court reviewed a number of its own previous decisions, which all dealt with



when decisions of the CRDD would be overturned notwithstanding that they were based on findings of credibility.

The Court affirmed that the Board is under a duty to state in clear, unambiguous terms the reason for casting doubt upon a claimant's credibility. Further, the Board acts arbitrarily in choosing to disbelieve an applicant's testimony where there exists no valid reason to doubt the truthfulness of it. Further, the Court affirmed that a finding of lack of credibility must be based on internal contradictions and inconsistencies and not extrinsic criteria upon which the Board draws inferences which are unsupported by the evidence.

Finally, the Court affirmed that it is open to the CRDD as a trier of fact to evaluate the evidence and accord due weight to it.

The inconsistencies upon which the Board relied were reasonably explained by the applicant's evidence and it was therefore not open to the CRDD to draw adverse inferences and conclude that the applicant was not believable.

Finally, the Board erred in finding the applicant not credible because he was unable to provide documentary evidence supporting his claim. The failure to offer documentary evidence, while a correct finding of fact, in this case cannot be related to the applicant's credibility in the absence of evidence to contradict the allegations made by the applicant in his testimony before the CRDD.

Accordingly, the Court held that the CRDD erred in law when it concluded that the applicant was not credible and set aside the decision and referred the matter to a differently constituted panel to reconsider the evidence in accordance with the Court's reasons.

*Mosa v. Canada (Min. of Employment & Immigration)*, (1993), 154 N.R. 200 (Fed. C.A.).

The appellant's claim for refugee status was rejected. Not every inaccuracy of interpretation, no matter how trivial, will furnish a good ground for interfering with the decision of the Refugee Division. The Court will only interfere where it is apparent that an error causes some prejudice to a claimant.

In this case, the Court found that an accurate translation of a portion of the evidence might well have enabled the Refugee Division to put further questions to the appellant as to the nature of her fear, to determine whether such fear was well-founded. The inaccurate interpretation prevented that line of questioning. This demonstrated potential prejudice to the appellant in establishing her claim. Accordingly, the decision of the Refugee Division was set aside.

*Villalta v. Canada (Solicitor General)* (1993), 68 F.T.R. 304.

The applicant arrived in Canada from El Salvador and claimed refugee status on the ground that he feared forced conscription into the army and he feared harassment by the guerillas who made efforts to require him to support or join them. He strongly disagreed with the methods used by the army and would not participate in it. While originally sympathetic to the guerillas, he could not accept their methods. On December 31, 1991 a peace treaty was signed by the guerillas and the government. This treaty was the result of twenty months of UN mediated negotiations. The applicant was found not to be a Convention refugee largely based upon the changed country conditions in El Salvador.

When determining whether status has been lost, one must ascertain that the reasons for the fear have ceased to exist. When determining whether status should be granted,

changed country conditions, even those stopping short of cessation, is one factor among many which can be taken into account in determining whether the individual faces a reasonable chance of persecution. If the conditions set out in section 2(2) exist, there is absolutely no doubt that the individual is not entitled to status but this does not mean that in order to take changed country conditions into account when determining whether to grant status, that the panel must first go through the conceptual exercise of subtracting changed conditions from their analysis and then, after making that analysis, move on to assess the significance of the changed country conditions.

The tribunal did not commit an error by taking into account changed country conditions without first determining whether the requirements of cessation under section 2(2)(e) were met. Accordingly, the application was dismissed.

*Miranda v. Canada (Min. of Employment & Immigration)* (1993), 63 F.T.R. 81.

This was an application for judicial review of a decision of the Refugee Board determining that the applicant was not a Convention refugee. A Refugee Board decision must be interpreted as a whole. It should not be subject to microscopic examination nor should particular statements in the decision be subject to a semantic autopsy. The decision must be analyzed in the context of the evidence to determine if the conclusions reached were reasonable or patently unreasonable. Where one finds error in the Board's decision, one must also find the error to be material to the decision reached. Artful readers can find any number of errors when dealing with decisions of administrative tribunals. Whereas here the conclusions of the Board are well-founded on the evidence, the decision will be upheld.

*Ye v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 77 (Fed. C.A.).

The appellant appealed a negative decision of the Convention Refugee Determination Division. In overturning the Board's decision the Court noted that a finding of lack of credibility based on problems internal to the claimant's testimony is more insulated from appellate review than a finding of implausibility based only on extrinsic criteria. The Board drew inferences which were subject to challenge.

The appellant feared persecution not only because of his presence in certain demonstrations but also because he donated to the demonstrators' cause; because he videotaped and distributed television broadcasts from Hong Kong; because six of his similarly situated friends were arrested and not seen again; because the authorities actually came for him and because after he went into hiding they continued to pursue him through his family; and finally because they closed his business. Little of the appellant's real case was explicitly faced by the Board.

The decision of the Board was set aside and the matter returned to a differently constituted Board for rehearing and redetermination.

*Shanmugarajah v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-609-91, June 22, 1992.

The appellants appealed a negative decision of the Convention Refugee Determination Division. The Board concluded that the appellants' fears were purely speculative. In allowing the appeal the Board noted that it is almost always foolhardy for a Board in a refugee case where there is no general issue as to credibility to make the assertion that the claimants had no subjective element in their fear.

*Velauthar v. Canada (Min. of Employment & Immigration)* (1992), 141 N.R. 239 (Fed. C.A.).

Following receipt of the evidence, the panel indicated that it was concerned with whether the persecution feared by the appellants was caused by a "Convention reason" and invited written submissions from the appellant's counsel and the refugee hearing officer. An invitation which was accepted. The decision denied the claim on the basis of the appellant's credibility.

There was a gross denial of natural justice. The panel had stipulated that the appellants had feared persecution and that the only issue was whether that persecution was encompassed in the Convention refugee definition. It proceeded on grounds of credibility to negate its stipulation, thus denying the appellants the opportunity to know and answer the case against them by a deliberate decision. The decision of the Convention Refugee Determination Division was quashed and the matter was referred back for rehearing by a differently constituted panel.

*Komanov v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 15, 7 Admin. L.R. (2d) 135, 143 N.R. 233 (Fed. C.A.).

This application to reopen the applicant's request for leave to appeal a negative decision of the Refugee Division of the Immigration and Refugee Board was refused. Counsel for the applicant alleged the discovery of the existence of "standardized pattern negative decisions for refugee claimants from Bulgaria" and submitted them to the Court as a basis for an allegation of bias. The "pattern negative decisions for Bulgarian claimants" represented a course of conduct not to be recommended for an administrative tribunal like the Immigration and Refugee Board, but nevertheless those decisions that were presented to the Court did not appear to prejudge any issue and made it quite clear that such "pattern decisions" should only be used once members who had heard a particular case had made up their minds to reject the claim. These decisions went to form and not to substance.

*Abarajithan v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-805-90, January 28, 1992.

The Refugee Division decided that the appellant was not a Convention refugee. As the law stood at the time of this decision, the failed claimant had a right of appeal to the Federal Court of Appeal. The Court noted that not every misunderstanding of evidence by a tribunal is fatal to its decision. In cases such as this one, however, where the tribunal has made the erroneous view of the evidence the centrepiece of its reasoning, the decision cannot stand. In this particular appeal the tribunal had misunderstood the appellant's testimony about his ability to obtain employment in Sri Lanka. Accordingly, the decision of the Refugee Division was set aside and the matter referred back to a differently constituted panel for rehearing and redetermination in a manner not inconsistent with the Court's reasoning.

*Sivaguru v. Canada (Min. of Employment & Immigration)* (1992), 16 Imm. L.R. (2d) 85 (Fed. C.A.).

For digest, see section 69.1, subheading *Subsection (5), supra*.



*Ponniah v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 241, 132 N.R. 32 (Fed. C.A.).

This was an appeal from a decision of the Refugee Division denying the applicant's refugee claim. An applicant does not have to prove that persecution would be more likely than not. He has to establish good grounds or a reasonable chance for fearing persecution. Good grounds or reasonable chance is defined as occupying the field between upper and lower limits. It is less than a 50% chance but more than a minimal or mere possibility. There is no intermediate ground; what falls between the two limits is "good grounds". If the claimant may face slightly more than a mere possibility of persecution, he has crossed over the lower limit and made his case of "good grounds" for fearing persecution.

*Retnem v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 317, 132 N.R. 53 (Fed. C.A.).

The Board's failure to deal with the cumulative nature of the persecution the claimant alleged led to a reversal of its decision. Even though the claimant did not leave Sri Lanka for some years after his detention and torture, that incident was still current as a basis for fear when linked with all of the smaller previous and subsequent harassment he endured the same month the couple were married.

*Tung v. Canada (Min. of Employment & Immigration)* (1991), 124 N.R. 388 (Fed. C.A.).

This was an appeal from the Refugee Division of the Immigration and Refugee Board. While there is no statutory requirement for keeping a complete record of the proceedings before the Refugee Division, the Board has a policy of recording those proceedings on tape and making a full transcript available for possible use on an appeal. The Board's policy was not implemented in this case and disadvantage accrued to the appellant. It is no answer to say that the recording equipment broke down through no fault of the Board's. The quality of interpretation was found wanting. The appellant was entitled, through the interpreter, to tell the story of his fear in his own language, as well as he might have done had he been able to communicate to the Board in the English language (the language of this hearing). The failure to provide an adequate interpreter prejudiced the appellant in the proceedings before the Refugee Division and before the Court of Appeal, who were required to review important aspects of the Board's decision on a deficient record.

The Refugee Division found that the appellant's failure to claim "asylum" in any of the countries he visited en route to Canada was inconsistent with the conduct of a person who fears for his life. There was no evidence that any of the countries the appellant visited had ratified the 1951 U.N. convention and the 1967 protocol or that they had adopted laws implementing those instruments. The Board is authorized under section 68(2) to take notice of any facts that may be judicially noticed. It is wrong for the Board to speculate that refugee protection was available in the countries that the appellant stopped in (Hong Kong, Thailand, Bolivia and Peru). The Court noted that the appellant was at all times in transit to Canada and had already decided to claim refugee status after he arrived here. The Court noted that the Board is normally required to give detailed reasons for disbelieving a claimant. The absence of such reasons may suggest that the Board had no overriding concern with the appellant's credibility. There was no expressed

or implied rejection of the appellant's credibility as a witness on his own behalf. The Refugee Division decision betrayed a possible confusion as to the proper test. The Refugee Division members said that they were not convinced that the motivation behind the client's fleeing China was fear. The Court noted that the issue at this point was the well-foundedness of the appellant's fear and that the words used introduced the subjective element into a test, which at that stage was entirely objective.

*Hilo v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 199, 130 N.R. 236 (Fed. C.A.).

The Refugee Division was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakeable terms. The Board's credibility assessment was defective because it was couched in vague and general terms. The claimant had only attended informal meetings of a political group inside Syria. The Refugee Division viewed this group as loosely knit with apparently charitable aims, no official title or status and noted further that the claimant was only 14 years of age at the time of his attendance. The Court found that characterizing the group in this way was irrelevant. The Syrian authorities had sought to persecute the appellant because of his perceived political opinion. The proper test for evaluating political activities is not whether the division or members considered that the appellant had engaged in political activities but whether the ruling government of the country from which he claimed to be a refugee so considered his conduct.

*Padilla v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 1 (Fed. C.A.).

The appellant appealed a decision of the Convention Refugee Determination Division that the appellant was not a refugee. The Board found that the appellant's fear of returning to El Salvador was fear of prosecution not persecution. The Board appeared to have accepted the appellant's evidence that he was a conscientious objector. The appellant also testified that he thought he would be executed extra-judicially upon his return to El Salvador. This belief was supported in the documentary evidence presented. It was not reasonable for the Board to conclude that an army deserter might not be subjected extra-judicially to treatment of the type the appellant feared. By confining its consideration of the consequences of the appellant's desertion to what might occur through due legal process, the Board ignored the basis upon which the appellant asserted his fear of persecution as well as the appellant's evidence whose credibility the Board did not question. The appeal was allowed and the matter referred back to the Board for full rehearing by a differently constituted panel.

*Rajaratnam v. Canada (Min. of Employment & Immigration)* (1991), 135 N.R. 300 (Fed. C.A.).

This was an appeal from a decision of the Immigration and Refugee Board refusing the appellant's claim for refugee status. A properly arrived at decision of the Board based purely and simply on the claimant's credibility affords no basis in law for interference by the Court of Appeal. Contradictions or discrepancies in the evidence of a refugee claimant are a well-accepted basis for a finding of the lack of credibility. Refugee claimants, however, are in a peculiar position because their mother tongue is neither of the official languages. The personal information form is prepared and the testimony

is given almost always with the assistance of an interpreter. This does not mean that a refugee claimant is absolved of the duty of telling the truth, but it does mean that the tribunal hearing the evidence is required to give reasons for a finding of a lack of credibility in clear and unmistakable terms. Internal inconsistencies between the evidence and the personal information form can sometimes be innocent misunderstandings due to the fact the claimants are assisted on separate occasions by different interpreters.

A Board member during the course of this hearing intervened in the questioning of the applicant on a fairly extensive basis and explored areas which the appellant's counsel and the Refugee Hearing Officer had already explored. The Board member by his or her questioning removed her judicial hat and put on the hat of an advocate.

There are very sound reasons why a judge must stay within proper bounds in questioning a witness. A judge who observes the demeanour of witnesses while they are being examined has a much more favourable opportunity of forming a just appreciation of the witnesses' credibility. If the judge descends into the arena his or her vision may become clouded by the dust of conflict. Unconsciously a judge, in such a situation, deprives him or herself of the advantage of calm and dispassionate observations. Further, the demeanour of a witness is apt to be very different when the questioner is a judge as opposed to counsel, particularly when the judge's examination is prolonged and covers practically the whole of the crucial matters in issue. When this happens it is open to an appellate court to find that the view of the trial judge as to the demeanour of the witness was ill-founded.

The Court of Appeal adopted the observations of Lord Denning in *Jones v. National Coal Board*, [1957] 2 Q.B. 55 at 64 (C.A.):

The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

In the result, the appeal was allowed, the decision of the Refugee Division set aside and the matter referred back to a differently constituted panel for redetermination.

*Orelien v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 592, 15 Imm. L.R. (2d) 1, 135 N.R. 50 (C.A.).

Canada's obligations in the area of refugees stem from the 4th Geneva Convention of August 12, 1949, and protocol due to the Geneva Convention of August 12, 1949, both approved by Acts of Parliament (Geneva Conventions Act, R.S.C. 1985, c. G-3, s. 2, as am. S.C. 1990, c. 14, s. 1), as well as a customary norm of temporary refuge. To return a person to Haiti in the circumstances that presently exist and have existed at relevant times in this case would have violated Canada's obligations under the Convention, the protocol and the customary norm of international law prohibiting the forceable repatriation of foreign nationals who have fled generalized violence and other threats to their lives and security arising out of internal armed conflict within their state of nationality. The Convention, the protocol and the customary norm of international law have the force of domestic law in Canada and can be enforced in the courts of Canada at the suit of a private individual. The intention to execute a deportation order



which if executed would breach those laws does not colour the process under the Immigration Act by which a person from such a country may be ordered deported. This is not to denigrate the importance of the Convention, the protocol and the customary norms of international law. It would be a grave and justiciable matter if Canada were to execute deportation orders in circumstances which breached obligations under international law and put the life, liberty or security of persons in peril.

*Mahathmasseelan v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 29, 137 N.R. 1 (Fed. C.A.).

The decision of the Refugee Division was overturned. The Division found inconsistencies in the claimant's testimony, refused to believe her and dismissed her claim for refugee status.

The Board, however, did not find a total absence of credibility. The Board members did believe the claimant had been detained and had suffered some type of sexual abuse. Furthermore, the inconsistencies found by the Board, although not insignificant, were not central to the appellant's claim. Finally, the Board ignored important parts of the appellant's case and admitted documentary evidence which confirmed the Tamils had been the victims of racial hatred and that the authorities had committed serious human rights abuses against them. The documentary evidence, together with the aspects of the claimant's testimony that were credible, were sufficient to show an objective basis for the claimant's fear of persecution. The appeal was allowed and pursuant to subparagraph 52(c)(i) of the Federal Court Act the Court gave the decision that the Refugee Division should have given and declared the appellant to be a Convention refugee.

*Mensah v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-1173-88, November 23, 1989.

The decision of the Immigration Appeal Board determining the applicant not to be a convention refugee was overturned primarily because the facts which the Board itself said were not contested satisfied, at least on a *prima facie* basis, both the subjective and the objective elements of the test for refugee status. The Board could not, in those circumstances, simply disregard those facts.

*Gracielome v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 237 (Fed. C.A.).

The Federal Court of Appeal overturned a decision of the Immigration Appeal Board on a question of credibility based on three alleged contradictions in the evidence of the applicant. In none of the three cases were the contradictions put to the witness. The Court concluded that each example was found by the majority of the Board after the fact from a painstaking analysis of the transcript. In those circumstances, the Board was held to be in no better position to weigh the contradictions than the Federal Court itself and the application was allowed and the decision of the Board set aside.

*Owusu-Ansah v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 106, 98 N.R. 312 (Fed. C.A.).

Adverse findings of credibility based on inconsistencies in the record which often go unnoted during the hearing and unremarked by counsel in argument will result in decisions which can be attacked on appeal. The Court noted that reasons for a decision

are composed by the Board some considerable time after the decision and not, as in the usual judicial proceeding, as a critical part of the decision-making process. Where the Court feels that the Board has overreached itself in its search for inconsistencies, the Board's decision will be set aside.

*Salamat v. Canada (Imm. App. Bd.)* (1989), 8 Imm. L.R. (2d) 58 (Fed. C.A.).

The Immigration Appeal Board found that the applicant was not credible. Notwithstanding that this was a finding of credibility, the Board's decision was set aside because the finding of credibility was based on irrelevant considerations and on considerations that were not established by the evidence.

*Yaliniz v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-648-87, March 8, 1988.

The applicant's claim for refugee status was denied by the Immigration Appeal Board on the basis that, in the Board's opinion, the evidence of the applicant was not credible. This opinion was not based on discrepancies or contradictions in the applicant's testimony, but merely on the feeling that there were obvious exaggerations in what he was recounting. The decision of the Board was set aside. The Board's apparent complete rejection of the applicant's statements was not justified. The Board should have asked itself whether, even assuming some exaggerations, the applicant had not shown that he had been undoubtedly the victim of harassment of a variety of forms amounting to persecution, making his fear to go back to his former home not only genuine but objectively founded.

*Re Saddo and Imm. Appl Bd.* (1981), 126 D.L.R. (3d) 764 (Fed. C.A.).

The decision of the Board that the applicant was not a Convention refugee was set aside because the Board decided, incorrectly, that extracts from newspapers had no evidentiary value. It was incorrect for the Board to say that a claimant must establish, other than by the production of newspaper articles, that he has a well-founded fear of persecution. The Court held that newspaper articles have evidentiary value and that they must be weighed by the Board with all the other elements of proof submitted in support of the applicant's claim.

*Woolaston v. Min. of Manpower & Immigration*, [1973] S.C.R. 102 (S.C.C.).

The Supreme Court of Canada declined to conclude that, because certain evidence was not mentioned in the Board's reasons, the Board had failed to consider it.

### ***Subsection (II)***

*Mehterian v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-717-90, June 17, 1992.

The requirement that the Refugee Division give written reasons for any decision against a claimant mandates that the reasons must be sufficiently clear, precise and intelligible so that the claimant may know why his claim has failed and decide whether to seek leave to appeal.

*Sebaratnam v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 264, 131 N.R. 158 (Fed. C.A.).

This was an appeal from a decision of the Refugee Division rejecting the appellant's

claim to be a convention refugee. The Refugee Division referred to the evidence in considerable detail but said next to nothing by way of a comment upon it. A finding of lack of credibility must be drawn in clear and unmistakable terms.

**APPLICATION FOR DETERMINATION OF CESSATION OF REFUGEE STATUS — Application to vacate — Leave to apply — Notice — Copy.**

**69.2 (1)** The Minister may make an application to the Refugee Division for a determination whether any person who was determined under this Act or the regulations to be a Convention refugee has ceased to be a Convention refugee.

(2) The Minister may, with leave of the Chairperson, make an application to the Refugee Division to reconsider and vacate any determination made under this Act or the regulations that a person is a Convention refugee on the ground that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, whether exercised or made by that person or any other person.

(3) An application to the Chairperson for leave to apply to the Refugee Division under subsection (2) shall be made *ex parte* and in writing and the Chairperson may grant that leave if the Chairperson is satisfied that evidence exists that, if it had been known to the Refugee Division, could have resulted in a different determination.

(4) An application to the Refugee Division under this section shall be instituted by filing, in the manner and form prescribed by the rules of the Board, a notice of application with the Refugee Division.

(5) Where a notice of application is filed with the Refugee Division pursuant to subsection (4), the Minister shall forthwith send a copy of the notice to the person who is the subject of the application. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 61.

**Subsection (1)**

*Penate v. Canada (Min. of Employment & Immigration)* (1993), 71 F.T.R. 171.

The applicant sought to review the denial of his refugee claim on the basis that he was excluded pursuant to Article I(F) of the Convention. One of the issues in the appeal was the test to be applied in assessing the relevance of changed country conditions to the applicant's wife's refugee claim. There are two separate procedures respecting refugee status which exist in the Immigration Act: (1) the granting of Convention refugee status to someone, by the IRB, on application by that individual and with respect to which the individual has the burden of proof; and (2) the removal of that status from someone, by the Board, upon application by the Minister and with respect to which the Minister bears the burden of proof.

This latter procedure is provided for in section 69.2 of the Act. The criteria described



by Professor Hathaway in his text *The Law of Refugee Status* are framed by reference to the cessation of status, that is to the revoking of status after it has been granted and with respect to which the Minister, and not the individual, has the burden of proof. When the question is whether status will be granted, CRDD panels are required to weigh the evidence of changed country conditions in the balance with all the other evidence before them in assessing the applicant's claim.

The panel did not err in its approach. It weighed the evidence of changed country conditions as one aspect of the relevant evidence. Accordingly, the application was dismissed.

*Salinas v. Canada (Min. of Employment & Immigration)*, 17 Imm. L.R. (2d) 118, 6 Admin. L.R. (2d) 154, 93 D.L.R. (4th) 631, 142 N.R. 211, [1992] 3 F.C. 247, 57 F.T.R. 159n (C.A.).

This was an appeal from an order of the Trial Division whereby a decision of the Refugee Division to reconvene a hearing into the respondent's claim for refugee status was quashed and the Refugee Division ordered to render a decision on the basis of the evidence before it. The basis of the respondent's claim was her fear of persecution by agents of the state of Panama, which was headed by General Noriega. Some time after the conclusion of the respondent's hearing, but before a decision was rendered, the political situation in Panama changed. The presiding member of the panel notified the respondent that the hearing would be reconvened for the purpose of hearing evidence on these recent changes.

The appeal was allowed. The Refugee Division did not exceed its jurisdiction in reconvening the hearing. Section 68 endows the Refugee Division with powers and duties in relation to any proceedings before it. The distinction has been drawn by Parliament between "proceedings" and a "hearing" before the Refugee Division. The hearing is to be conducted in a manner required by section 69.1. The "hearing" is a step in any proceedings. "Proceedings" is a wider term encompassing the entire matter before the Refugee Division including the hearing itself. The Minister, pursuant to section 69.2(1), is able to initiate proceedings for a determination whether any person who was determined to be a Convention refugee has ceased to be so. The Court found force in the argument that evidence as to the change of conditions is better addressed in the same proceedings rather than in new proceedings initiated by the Minister subsequent to the Refugee Division's determination.

The Refugee Division was not *functus officio*. It had yet to make a determination of the claim. Until it did, the proceedings were pending and finality had not been reached. In order to arrive at its decision, the Refugee Division could exercise the power conferred by the statute, provided it did so properly by giving the respondent an opportunity to be heard at the reconvened hearing. An inquiry into any change of conditions in the appellant's homeland comes within the general mandate of the Refugee Division in determining the claim.

In *Lawal v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 404, the Court ruled that the only way for the Refugee Division, after the end of a hearing but before decision, to consider new evidence beyond that of which it might take judicial notice was by reopening the hearing. The Court's decision in *Longia v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 288, applies only where the Refugee Division has already reached a decision.

The appeal was allowed. The order of the Trial Division was set aside and the respondent's claim for refugee status was referred back to the Refugee Division for a continuation of the reconvened hearing.

***HEARING — Abandonment of application — Quorum — Decision — Rejection of otherwise established application — Split decision — Written reasons.***

**69.3 (1)** Where an application to the Refugee Division is made under section 69.2, the Refugee Division shall conduct a hearing into the application, after having notified the Minister and the person who is the subject of the application of the time and place set for the hearing, and shall afford the Minister and that person a reasonable opportunity to present evidence, cross-examine witnesses and make representations.

(2) If the Minister's counsel or agent fails to appear at the time and place set by the Refugee Division for the hearing into the application or, in the opinion of the Division, is otherwise in default in the prosecution of the application, the Division may, after giving the Minister a reasonable opportunity to be heard, declare the application to have been abandoned.

(3) Three members constitute a quorum of the Refugee Division for the purposes of a hearing under this section.

(4) The Refugee Division shall approve or reject the application and shall render its decision as soon as possible after completion of the hearing and send a written notice of the decision to the Minister and the person who is the subject of the application.

(5) The Refugee Division may reject an application under subsection 69.2(2) that is otherwise established if it is of the opinion that, notwithstanding that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact, there was other sufficient evidence on which the determination was or could have been based.

(6) In the event of a split decision, the decision of the majority of the members hearing the application shall be deemed to be the decision of the Refugee Division.

(7) The Refugee Division may give written reasons for its decision on an application, except that

(a) if the decision is against the person who is the subject of the application, the Division shall, with the written notice of the decision referred to in subsection (4), give written reasons with the decision; and

(b) if the Minister or the person who is the subject of the application requests written reasons within ten days after the day on which the Minister or person is notified of the decision, the Division shall forthwith give written reasons.

R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 62.

**Subsection (7)**

*Armson v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 150 (Fed. C.A.).

This section 28 application sought to set aside the unanimous decision of the Immigration Appeal Board that the applicant was not a convention refugee.

The applicant asserted a fear of persecution because of his political opinion and his membership in a particular social group. The Board disbelieved the applicant. The reasons for disbelieving the applicant were sparse. The Board owed a duty to the applicant to give reasons for rejecting his claim on the ground of credibility in clear and unmistakable terms. The Board's reasons did not contain a single word as to why the applicant's evidence was not credible. This formed an additional basis for setting aside the Board's decision. The application was allowed and the decision of the Board set aside and the matter remitted for a full hearing by a differently constituted panel.

**Immigration Appeal Division**

***COURT OF RECORD — Sole and exclusive jurisdiction — Powers — Notification of disposition — Written reasons.***

**69.4 (1) The Appeal Division is a court of record and shall have an official seal, which shall be judicially noticed.**

**(2) The Appeal Division has, in respect of appeals made pursuant to sections 70, 71 and 77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order or the refusal to approve an application for landing made by a member of the family class.**

**(3) The Appeal Division has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may**

**(a) issue a summons to any person requiring that person to appear at the time and place mentioned therein to testify with respect to all matters within that person's knowledge relative to a subject-matter before the Division and to bring and produce any document, book or paper that the person has or controls relative to that subject-matter;**

**(b) administer oaths and examine any person on oath; and**

**(c) during a hearing, receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it.**

**(4) The Appeal Division shall, in accordance with rules made under**



subsection 65(1), notify the parties to an appeal made pursuant to section 70 or 71 of its disposition of the appeal.

(5) The Appeal Division shall forthwith give written reasons for its disposition of any appeal made pursuant to section 70 or 71 where either of the parties to the appeal has so requested within ten days after having been notified of the disposition of the appeal. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 63.

### *Subsection (1)*

*Srivastava v. Min. of Manpower & Immigration*, [1973] F.C. 138 (Fed. C.A.).

Under section 23 of the Immigration Appeal Board Act, R.S.C. 1970, the appellant had a right to produce evidence before the Immigration Appeal Board and was not limited in his appeal to the record of the special inquiry. The Immigration Appeal Board constituted a Court of Record with the power to summon witnesses *etc.* and, accordingly, the Board erred in limiting the scope of an appeal to a consideration of the record of the special inquiry.

### *Subsection (2)*

*Khakh v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 548, 23 Imm. L.R. (2d) 38, 70 F.T.R. 26.

The applicant sought to overturn a decision of a credible basis panel holding a hearing under refugee provisions no longer in effect. The applicant alleged a reasonable apprehension of bias. The respondent argued that in failing to raise an objection on this basis before the credible basis panel, the applicant waived his rights to subsequently raise the issue. A reasonable apprehension of bias should be raised at the first opportunity. There is no waiver unless the party entitled to make the objection is fully aware of the nature of the disqualification and has adequate opportunity to make the objection. The Court will imply waiver where a party or its representative knows of the facts that give rise to an apprehension of bias and, notwithstanding, does not object. The party or its representative must be fully cognisant of the right to take objection. In this case, the adjudicator had, after the applicant requested an interpreter, refused the interpreter after testing the applicant in English. As the hearings progressed the adjudicator noticed that the applicant's English was deteriorating and this was taken to mean that the adjudicator had formed the view that the applicant was not doing his best in English. The failure of the unrepresented applicant to object to the adjudicator's jurisdiction on the basis of reasonable apprehension of bias, after this comment was made, was not taken to be a waiver of his rights to object before the Federal Court.

*Gagliardi v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-1142-87, January 9, 1990.

The appellant argued that the execution of the deportation order, having regard to all the circumstances, contravened his right not to be subjected to cruel and unusual treatment or punishment within the meaning of section 12 of the Charter. The Immigration Appeal Board was required to determine objectively the issue of cruel and unusual

treatment. Was it also necessary for the Board to study the personal characteristics of the appellant as well as the particular circumstances of the case? Section 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the persons on whom it is imposed. Though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

### Subsection (3)

*Kusi v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 281, 65 F.T.R. 58.

An adjudicator and member of the Immigration and Refugee Board were conducting a credible basis hearing into the claim of a Convention refugee claimant, pursuant to provisions of the Immigration Act in effect on August 19, 1992.

The tribunal accepted as evidence notes taken by an immigration officer, which recorded answers given to him at the port of entry by the applicant. The applicant contested the accuracy of the notes and asked that the officer be produced for cross-examination, a request which was denied by the tribunal.

The decision by the tribunal that there was no credible basis to the applicant's claim was set aside and the matter was remitted back for determination in accordance with the law. Specifically, the Court found that given the importance of the interest, namely the applicant's claim to be a Convention refugee, and given the fact that the applicant contested the accuracy of the notes which were relied upon by the tribunal, the rules of natural justice and of fundamental justice required that the cross-examination, which was sought, be allowed. The Court relied on the jurisprudence in *Canada (Min. of Employment & Immigration) v. Leal* (1991), 129 N.R. 383 (Fed. C.A.) and *Cheung v. Canada (Min. of Employment & Immigration)* (1981), 122 D.L.R. (3d) 41.

*Editor's Note:* Although occurring in the context of a repealed refugee hearing procedure, the principle in this case may have a broader application.

*Singh v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-859-88, September 22, 1992.

The appellant was a Canadian citizen who, in 1982, sponsored his adopted daughter. The visa officer was not satisfied that the adoption was legal according to the laws of India and had refused the application. The appellant had appealed to the Appeal Division and his appeal had been dismissed. The appeal to the Appeal Division was a proceeding *de novo*. The appellant had the burden of establishing that the adoption was not void under the Hindu Adoptions and Maintenance Act. The Appeal Division had accepted as trustworthy evidence an antedated version of the Hindu Adoptions and Maintenance Act, without proof that it was in force at the time of the adoption. The discretion as to the evidence that will be accepted as trustworthy is very broadly defined. In this case it was for the appellant to challenge the version of the Act being used by the Appeal Division and to lead evidence in support of that challenge. The appellant failed to do this and the discretion conferred upon the Board by this section was broad enough to permit it to act upon the version of the Hindu Adoptions and Maintenance Act that was before it.

*Filipe v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 119 (Fed. C.A.).

This was a section 28 application seeking review of an Immigration Appeal Board decision determining that the applicant was not a Convention refugee. At the hearing, documentary evidence was filed which was not supported by an affidavit or a statutory declaration. The Board rules that such a deficiency merely affected credibility and trustworthiness rather than admissibility. Accordingly, the Board did not err in concluding that the documents in question were admissible. Further, because the applicant's counsel was given an opportunity to make significant submissions as to the evidentiary value of the documents, there was no denial of natural justice or procedural unfairness in the proceedings before the Board. Accordingly, this section 28 application was dismissed.

*Canada (Min. of Employment & Immigration) v. Taysir Dan-Ash* (1988), 5 Imm. L.R. (2d) 78 (Fed. C.A.).

Section 65(2)(c) has the purpose and effect of freeing the Board's hearings from all the technical rules of evidence and, particularly, the "best evidence" and "hearsay" rules. Accordingly, the certificate of a fingerprint examiner was admissible. The actual examiner himself was not required to testify.

*Canada (Min. of Employment & Immigration) v. Rajpaul; Canada (Min. of Employment & Immigration) v. Stuart*, [1988] 3 F.C. 157, 31 Admin. L.R. 161, 5 Imm. L.R. (2d) 97 (Fed. C.A.).

In these two appeals, the individuals involved had sought to sponsor the applications for landing of their respective spouses. The sponsored applications were refused on the basis that the marriages were ones of convenience. In each case, the hearing of the sponsor's appeal was adjourned *sine die* by the Board after it had refused to receive the spouse's evidence by a telephone conference call that had been arranged by the sponsor. The trial judge quashed the decision to refuse to issue visitors visas to the spouses and ordered that the applications be reconsidered on the basis that the sponsor's right to a fair hearing in accordance with the principles of fundamental justice had been infringed. The operation of the trial judge's order was stayed until the spouses had confirmed that they would submit to custodial detention in order to be removed back to Guyana after giving their testimony before the Immigration Appeal Board. When the consequence of a hearing may be to prevent the cohabitation in Canada of a husband and wife, a very high measure of fairness is called for. The evidence of the sponsored spouse as to the *bona fides* of the marriage could not be more relevant when the issue on appeal is the conclusion that the marriage was one of convenience. Accordingly, the Board must provide for the evidence to be introduced in a way that will permit the Board to resolve fairly the questions of credibility. The Court was at a loss to understand the Board's refusal to receive the evidence by telephone conference calls. This procedure had been proposed by the sponsors and, thus, they could not have complained later about it. Further, the Board having heard the evidence would then have been able to judge its credibility.

*Fleming v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-534-86, October 7, 1987.

This case was a section 28 application to review and set aside a decision of the Immigration Appeal Board. The Board had dismissed the applicant's motion requesting



the Board to set aside its decision dismissing the applicant's appeal from a deportation order and re-open the appeal in order to permit the applicant to adduce further evidence in support of a plea that the Board exercise its equitable jurisdiction in the applicant's favour.

The case illustrates the difference between additional evidence and new evidence. The party seeking to adduce additional evidence must satisfy the Board that:

1. He could not have obtained such evidence by reasonable diligence before the original hearing of the appeal; and
2. The evidence sought to be introduced is of such a nature that, if satisfactorily proved, it would furnish a sufficient reason for the reconsideration of the Court's original disposition of the appeal. New evidence is evidence which was not in existence at the time of the hearing of the appeal. It must be examined by the Board to determine whether or not it was of sufficient weight in relation to the other evidence in the case that the Board should exercise its discretion and re-open the case.

The application was granted. The Immigration Appeal Board had failed to recognize that some of the applicant's material was new evidence as opposed to additional evidence and, accordingly, had not applied the relevant test in dismissing the applicant's application.

*Shanker v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-535-86, June 25, 1987.

This was an appeal by a Canadian citizen from a decision of the Immigration Appeal Board dismissing an appeal against refusals of the sponsored applications of the citizen's father, mother and two brothers. The basis for the refusal was the opinion of a medical officer, concurred in by a second medical officer, that the mother was suffering from pulmonary tuberculosis, "possibly active". A visa officer found her inadmissible under section 19(1)(a)(i) of the Immigration Act. At the Immigration Appeal Board hearing, new evidence as to the mother's condition, subsequent to the rejection, was provided. This Court adopted the view that evidence as to the mother's condition, subsequent to the visa officer's refusal, was not relevant to the question of whether that refusal was lawful. It was argued that the medical notification, upon which the refusal was based, had not taken into account the results of subsequent medical inquiries. This argument failed because neither the transcript of the hearing before the Board, nor any document on the record, suggested that there was any response to the request for further medical information. Nor was there any suggestion that the appellant's mother had complied with the request to contact the doctor who examined her so that he might reply to the visa officer.

*Stuart v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2591-86, April 16, 1987.

This application was made to obtain *certiorari* to quash the respondent's decision not to grant a visitor's visa to the applicant's spouse to enter Canada for the purpose of testifying as a witness at the applicant's appeal hearing before the Immigration Appeal Board. The applicant had sought to sponsor his spouse for entry as a member of the family class, but the respondent claimed that the marriage was entered into only for the purposes of gaining admission to Canada. It was determined that the applicant would be denied a fair hearing if he was prevented from calling his wife as a witness. Her

son, who was 5 years old, was not granted permission to enter Canada. *Certiorari* was granted on condition that the applicant's spouse remain in custody for the purpose of ensuring her immediate return to Guyana after any attendance before the Immigration Appeal Board. The basis for admission was section 19(3) of the Act.

*Uppal v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 143 (Fed. C.A.).

The appellant, a Canadian citizen, sponsored applications for landing of members of the family class, his father, mother, one brother and two sisters. The applications were refused by the visa officer. The visa officer relied upon the opinion of two medical officers, as defined in section 2 of the Act. The appellant appealed to the Immigration Appeal Board and sought to adduce, before the Board, medical evidence to contradict the medical officer's diagnosis. The Immigration Appeal Board declined to receive this evidence and dismissed the appeal. The appellant then, pursuant to section 84, appealed to the Court of Appeal. A majority of the Court of Appeal held that the Board was required to receive the additional evidence in considering the correctness of the visa officer's opinion. The minority judgment was of the view that the Board was correct in refusing to receive evidence tendered to contradict the opinion given by the two medical officers. A minority view was that the visa officer was required to base his rejection on the opinion of these two officers and, so long as he properly did that, his opinion was entitled to be sustained. The opinions of other medical experts on the subject presented to the Board were, in the minority view, not pertinent to the issue of the correctness of the formation of the visa officer's opinion. The Court was unanimous in concluding that the relevant time to be considered by the Board on the appeal was the time of the visa officer's decision and not the time of the Board's hearing of the appellant's appeal.

The Court of Appeal was unanimous in pointing out that a consent judgment has no precedential value. The Court granting a consent judgment is concerned with only two things: the capacity of the parties to agree; and the Court's jurisdiction to make the order that the parties have agreed to ask it to make. Consent judgment reflects neither findings of fact nor a considered application of the law to the facts by the Court.

Finally, the Court unanimously agreed that evidence of the current medical condition of the appellant's father and sister was relevant to the question of whether humanitarian or compassionate consideration existed that would warrant the Board granting special relief.

*Rajpaul v. Canada (Min. of Employment & Immigration)* (1987), 24 Admin. L.R. 153 (Fed. T.D.).

The applicant sought *certiorari* quashing the respondent's decision not to grant a visitor's visa to Sumintra Ramdas to enter Canada for the purpose of testifying as a witness. The applicant had applied to sponsor Ramdas, whom he alleged to be his wife. The application was refused on the basis that the marriage had been entered into primarily for the purpose of gaining admission into Canada as a family class immigrant and not with the intention of residing permanently with the other spouse. *Certiorari* was granted.

The outcome of the applicant's appeal to the Immigration Appeal Board, obviously, would depend upon the Board's assessment of the spouse's credibility on the issue of her primary purpose in entering into the marriage. The applicant had a substantive right to a fair hearing and could not be denied the opportunity to present this crucial evidence

and testimony to the Board. It was a condition of the discretionary remedy that the spouse remain in detention pending the giving of evidence at the respondent's option. This latter condition was agreed to during the argument by counsel for the applicant.

The Court noted that in this case there was no previous conduct in Canada by the sponsoree that would justify the Court withholding *certiorari*.

*Toor v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 104 (Fed. T.D.).

Visitors' visas were refused to the father, mother, brother and sister of Mr. Toor. He wanted them to come to Canada to testify at his appeal before the Immigration Appeal Board, pursuant to section 79 of the Act, against the refusal to issue immigrants' visas. Two points in issue at the appeal were whether the relatives were really dependants of Mr. Toor and whether Mr. Toor was financially able to maintain them in Canada.

A decision by a visa officer that a person was not a *bona fide* visitor, simply because he wants to come to Canada and testify before the Board, would be an error in law. Here, however, the refusal of the visitors' visas was on the grounds that the applicants were not answering truthfully to the questions, that they would resist returning to India once in Canada, and on the grounds that they could not afford the expenses involved. Such a decision is not open, in the absence of bad faith or bias, to review by way of *certiorari*. Accordingly, the application was denied.

*Singh v. Canada (Min. of Employment & Immigration)* (1986), 6 F.T.R. 15 (Fed. T.D.).

This application for *certiorari* quashing the decision of the respondent Minister not to grant the Minister's consent to Saudagar Gill to enter Canada for the purpose of testifying as a witness before the Immigration Appeal Board was dismissed.

The applicant was the wife of Saudagar Gill. Her sponsorship of her husband had been refused and she had appealed to the Immigration Appeal Board. The Board issued a summons to the husband who was in India. The Minister's consent was required for the attendance of the witness because Gill had been previously deported. The original sponsorship had been refused for a variety of reasons, one of which was that the marriage offended section 4(3) of the Regulations. The Minister declined to give his consent to Gill returning to Canada, and, thus, Gill was unable to appear as a witness at the Immigration Appeal Board. It was held that the Minister's decision under section 57 was administrative. The Minister was not, in refusing consent, exercising a *quasi-judicial* function; therefore, he was not required to give reasons for his decision. Consequently, the failure to give reasons, in this case, could not give rise to relief by way of *certiorari*. Further, the relief sought was discretionary, and no basis for exercising that discretion in favour of the applicant was to be found on the facts of this case.

*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386 (Fed. C.A.), reversing [1985] 2 F.C. 124 (Fed. T.D.).

The applicant sponsored his relatives' family class application for permanent residence. The application was denied and the applicant appealed to the Immigration Appeal Board. The visa officer refused to issue visitors' visas to the relatives who were required as witnesses at his appeal. The visas were refused on the basis that the applicants were not *bona fide* visitors because their intention was to testify at the applicants appeal.



An order of *mandamus* was issued requiring the Minister to grant the relatives visitors' visas to allow them to testify at the appeal. This order was reversed on appeal. *Mandamus* will issue to require performance of a duty; it cannot, however, dictate the result to be reached. *Certiorari* might have been available to quash the refusal of the visitors' visas and to refer the matter back for reconsideration but the respondent had not sought this type of order.

*Jolly v. Min. of Manpower & Immigration*, [1975] F.C. 216 (Fed. C.A.).

Once the board admits evidence, it does not err in giving it little or no weight.

### **Subsection (5)**

*Restrepo v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 161 (Fed. C.A.).

The respondent obtained permanent residence status in 1974. He returned to Colombia in 1978 and did not return to Canada until 1986. Following an inquiry, an adjudicator held that the respondent had lost his permanent residence status. The respondent appealed to the Immigration Appeal Board. The Board purported to allow the appeal notwithstanding the fact that the adjudicator's decision was in accordance with the law in "view of the circumstances of the instant case." The Minister filed an appeal and requested written reasons from the Board. The Board issued a set of written reasons which did not justify their original decision but which put forward a new basis for their decision.

When requested to provide reasons, the Board has no further jurisdiction. The only thing the Board can do in its written reasons is correct the material errors in the original decision.

The second decision was substantially different from the first and there was no indication that the Board was merely correcting a material error. Accordingly, an appeal from both decisions was allowed and the matter was referred back to the Board.

### **SITTINGS — Quorum — Exception.**

**69.5 (1) The Appeal Division shall sit at such times and at such places in Canada as are considered necessary by the Chairperson for the proper conduct of its business.**

**(2) Three members constitute a quorum of the Appeal Division.**

**(3) Notwithstanding subsection (2), the Chairperson may designate a member of the Appeal Division to hear and determine**

- (a) an appeal made under section 70, 71 or 77,**
- (b) an application made under section 75, or**
- (c) a motion made pursuant to rules made under section 65(1),**

**and the provisions of this Part apply in respect of a member so designated as they apply in respect of the Appeal Division and the disposition of the appeal, application or motion by the member shall be deemed to be the disposition**

of the Appeal Division. R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 64.

*APPEALS BY PERMANENT RESIDENTS AND PERSONS IN POSSESSION OF RETURNING RESIDENT PERMITS — Appeals by Convention refugees and persons with visas — Grounds for appeal — Where limited right of appeal.*

70. (1) Subject to subsection (4), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,

- (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
- (b) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

*APPEALS BY PERMANENT RESIDENTS.*

70. (1) Subject to subsection (4), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a document provided to that person pursuant to section 10.3 and in accordance with the regulations, that person may appeal to the Appeal Division on either or both of the following grounds: [1992, c. 49, s. 65. Not in force at date of publication.]

*APPEAL OR REFUSAL UNDER S. 10.3(2)*

(1.1) A person to whom a visa officer refused to provide a document under subsection 10.3(2) may appeal that refusal to the Appeal Division on any ground of appeal that involves a question of law or fact, or mixed law and fact. [1992, c. 49, s. 65. Not in force at date of publication.]

(2) Subject to subsections (3) and (4), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who

- (a) has been determined under this Act or the regulations to be a Convention refugee but is not a permanent resident; or
- (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

(3) An appeal to the Appeal Division under subsection (2) may be based on either or both of the following grounds:

- (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
- (b) on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

(4) Where a deportation order or conditional deportation order is made against a person described in subsection (1) or paragraph (2)(a) or (b) who

- (a) is a person with respect to whom a certificate referred to in subsection 40(1) has been issued or a certificate referred to in subsection 40.1(1) has been issued and has not been quashed under paragraph 40.1(4)(d), other than a person described in subparagraph 19(1)(c.1)(ii) or 19(2)(a.1)(ii), or
- (b) has been determined by an adjudicator to be a member of an inadmissible class described in paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l),

that person may appeal to the Appeal Division on any ground of appeal that involves a question of law or fact, or mixed law and fact. R.S.C. 1985 (3d Supp.), c. 30, s. 9; R.S.C. 1985 (4th Supp.), c. 28, ss. 18, 35; 1992, c. 49, s. 65.

### *Subsection (1)*

#### *Paragraph (a)*

*Canada (A.G.) v. Chanoine* (1987), 4 Imm. L.R. (2d) 136, 15 F.T.R. 143 (Fed. T.D.).

The Attorney General applied for a Writ of *Certiorari* and a Writ of *Mandamus* setting aside the decision of an adjudicator not to hold an inquiry concerning the respondent and ordering the adjudicator to proceed with the inquiry.

The respondent was given the status of a permanent resident and subsequently left Canada for a period of 3 years. Just before returning to Canada, the respondent unsuccessfully applied for a visitor's visa. The respondent entered Canada and made no disclosures of any kind to the officer at the port of entry. A report was prepared indicating that the respondent was a person described in section 27(2)(b) and 27(2)(g) of the *Immigration Act*. The adjudicator declined jurisdiction adopting the argument that the respondent should have been proceeded with under section 27(1), which applied to permanent residents.

This decision of the adjudicator was set aside and the adjudicator was directed to continue the inquiry.

A permanent resident has been defined as a person who has been granted landing and who has not ceased to be a permanent resident pursuant to section 24(1). Accordingly, the respondent automatically lost his permanent resident status, pursuant to section 24(1), by reason of his having been outside of Canada for more than 183 days, unless he satisfied the adjudicator that he had not done so.



*Editor's Note:* This case should be read with *Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273, 110 D.L.R. (3d) 126 (Fed. C.A.).

*Lardizabal v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. Nos. 80-6248, 80-6267, November 30, 1981.

The Board reaffirmed that it will allow motions to reopen where the party seeking to introduce evidence proves that he could not have obtained it through a reasonable diligence before the original hearing, and that the evidence would constitute sufficient grounds for reconsideration of the Board's original disposition. In this case the Board held that the Minister, if responding favourably to a family's appeal for special consideration, would consider the family as a unit; it was reasonable to expect the Minister's decision before execution of a deportation order.

*Min. of Employment & Immigration v. Selby*, [1981] 1 F.C. 273 (Fed. C.A.).

The Immigration Appeal Board has jurisdiction to decide whether the applicant or appellant before it is a permanent resident; it, thus, has power to review a decision by the adjudicator that the applicant ceased to be a permanent resident of Canada when he left with the intention of abandoning Canada as his place of permanent residence.

*Eyzaguirre v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9268, December 11, 1980.

The appellant was compelled into a series of actions by her husband, who made the ultimate decision on all matters affecting the lives of family members. These actions resulted in the appellant's abandoning Canada and returning to Chile to live permanently. The appellant separated from her husband in Chile and, upon obtaining custody of her children and an exit permit immediately returned to Canada. The Court held that any lengthy absence from Canada must be reasonably explained and the Board must be satisfied that the absence and delay in returning to Canada were not motivated by an intention to abandon Canada permanently. In this case the appellant was absent from Canada from 1974 until 1978. Having regard to the Board's finding that the husband had foisted his intentions upon his wife, the appeal was allowed and a deportation order against the appellant quashed.

*Lew v. Min. of Manpower & Immigration*, [1974] 2 F.C. 700 (Fed. C.A.).

The appellant was convicted of an offence under the Criminal Code and was ordered deported. He appealed the conviction, was granted an absolute discharge, and subsequently appealed the deportation order to the Immigration Appeal Board. The Court held that the Immigration Appeal Board ought to have considered the appeal to it in light of the absolute discharge. The Board erred in considering circumstances existing at the time the deportation order was made to the exclusion of circumstances existing at the time the appeal was heard.

### **Paragraph (b)**

*O'Connor v. Canada (Min. of Employment & Immigration)* (1992), 21 Imm. L.R. (2d) 64 (Imm. & Ref. Bd. (App. Div.)).

The appellant, who was a permanent resident of Canada, was ordered deported

on May 16, 1991. The appellant was convicted of second degree murder and obstructing justice. On February 20, 1985 he was sentenced to imprisonment with no possibility of parole for a term of twelve years. The Appeal Division referred to its decision in *Ribic* (I.A.B. T84-9623), August 20, 1985 as a useful yardstick as to the circumstances relevant to the exercise of the Board's discretion. Factors include:

1. the seriousness of the offence leading to the deportation order;
2. the possibility of rehabilitation;
3. the length of time spent in Canada and the degree to which the appellant is established here;
4. the family in Canada and the dislocation to the family that deportation would cause;
5. the support available to the appellant, not only within the family but also within the community; and
6. the degree of hardship that would be caused to the appellant by his return to his country of nationality.

These factors are not exhaustive and the weight attached to each of them will vary according to the circumstances of the case. Further, the Appeal Division is required to exercise its discretion in a manner consistent with the objectives of the Immigration Act.

The murder was a situational and isolated act. The appellant at the time was a drug and alcohol addict. During his time in prison the appellant came to terms with his drinking and with the abuse which he had suffered as a child at the hands of his parents. The appellant was genuinely remorseful, not only for the life he took but also for the time he spent under the influence of drugs and alcohol. The deportation order was stayed with condition. The appellant was required to report to a Canada Immigration Centre and advise on employment and marital status each fifth month; report all changes of address to the Canada Immigration Centre and to the Appeal Division within 48 hours; and abstain from alcohol and all drugs excluding prescription or over-the-counter medication.

*Canepa v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 270, 10 C.R.R. (2d) 248, 93 D.L.R. (4th) 589 (C.A.).

The appellant was born in Italy in 1962 and came to Canada as a permanent resident with his family at the age of five. He became a drug addict and to support his addiction turned to a life of crime. Between 1978 and 1987 he was convicted of 37 offences. Eventually a report was issued pursuant to section 27(1)(d) and the adjudicator at the ensuing inquiry made a deportation order. This deportation order is in effect reversible on equitable grounds pursuant to section 70. When the scheme of the Act is looked at in total, on appeal, the tribunal must take into account all of the circumstances of the case which include the person in his total context and the good of society as well as that of the individual.

Section 70(1)(b) requires that every extenuating circumstance that can be adduced in favour of the deportee be considered by the Board on appeal.

This treatment of the appellant as mandated by sections 27 and 70 is not cruel and unusual treatment so as to contravene section 12 of the Charter.

*Aujla v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 81 (Fed. C.A.).

The appellant was admitted to Canada on condition that she marry a particular person. That person refused to marry her and she married someone else. She was not informed that she could apply to vary the terms and conditions of her visa. She was subject to an inquiry and ordered deported. The Appeal Division dismissed her appeal. In considering whether compassionate or humanitarian considerations warranted granting special relief, the Board failed to remark on the failure of the authorities to consider the possibility of varying the conditions of the appellant's admission and to take into account the marriage that she had entered into. Further, the Appeal Division failed to deal with the appellant's evidence as to the social stigma that would attach to her should she return to her native India. Accordingly, the Appeal Division had failed to take into account all of the relevant circumstances in declining to find humanitarian and compassionate conditions that might have warranted special relief. The decision of the Appeal Division was set aside and the matter remitted to a differently constituted panel.

*Willis v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 57, 87 N.R. 216 (Fed. C.A.).

This was an application to review and set aside a decision of the Immigration Appeal Board refusing to reopen proceedings before that Board which led to a determination that the applicant should be deported. When the Board is assessing the application to reopen proceedings, in light of its continuing equitable jurisdiction to reconsider whether or not a deportation order should be issued, the Board should apply the requirement that the "new evidence" should be evidence that had not been before the Board at the earlier date.

*Castro v. Canada (Min. of Employment & Immigration)* (1988), 5 Imm. L.R. (2d) 87, 86 N.R. 356 (Fed. C.A.).

The applicant appealed a decision of the Immigration Appeal Board refusing to reopen his appeal before the Board. The Immigration Appeal Board is not *functus* once it has rendered its decision. It has a continuing equitable jurisdiction with respect to an individual until that individual is deported from Canada. In the present case, the additional evidence came into existence after the original Board hearing. This type of *ex post facto* evidence can be entertained by the Board if it is relevant to the application to reopen. In order to justify reopening, the proffered evidence need only be such as to support a conclusion that there is a reasonable possibility as opposed to probability that the evidence could lead the Board to change its original decision. If the Board reaches the decision that the application to reopen is not *bona fide* and that it is merely a delaying tactic, it can rightly refuse an application to reopen on the ground of lack of *bona fides*.

*Parra v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-507-87, March 25, 1988.

This was an appeal from a refusal by a member of the Immigration Appeal Board to reopen an appeal from a deportation order which had been dismissed against the applicant. The reopening should not be granted unless the Board is satisfied that the evidence sought to be introduced, could not have been obtained by reasonable diligence for the original hearing, or unless the Board recognizes that it has failed in some way



to observe the rules of natural justice. The applicant argued that he had demonstrated reasonable diligence by obtaining the services of a lawyer to ensure proper presentation of his case and, therefore, he should not be fixed with the failure of his chosen counsel to use diligence in carrying out his obligation to put forward all relevant evidence to support the applicant's appeal. Counsel in this case had advised the applicant to bring his witnesses to the hearing. The fact that the applicant's common-law wife refused or neglected to come was, therefore, the responsibility of the applicant. Further, there was nothing to indicate the proposed evidence could have influenced the Board in such a way as to change the exercise of its discretion under section 72(2)(d).

*Sandhu v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 159 (Fed. C.A.).

This application was brought to review an order of the Immigration Appeal Board, which refused to reopen a hearing to consider evidence that arose subsequent to the Board's decision. The Court relied on *Grillas v. Min. of Manpower & Immigration*, [1972] S.C.R. 577 (S.C.C.), for the proposition that the Board's equitable jurisdiction is a continuing one. The fact that the evidence sought to be adduced in this case related to developments subsequent to the Board's decision did not limit the Board's power to reopen a hearing. The only limit on the Board's power to reopen was held to be the Board's own good judgment.

*Sandhu v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 159 (Fed. C.A.).

The Board has a power to reopen an appeal after dismissing it because its equitable jurisdiction is a continuing one. *Ex post facto* evidence can, in the Board's discretion, justify the reopening of an appeal.

*Cheema v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. V80-6404, December 20, 1982.

In this case the appellant had been ordered deported because he failed to disclose to the Minister, when he obtained landed immigrant status, that he had been previously deported from Canada. The appellant had been previously deported from Canada because he was not a "bona fide visitor". He had been in Canada 6 years as a landed immigrant. He was married, had been steadily employed, had paid taxes for the 6 years that he had been in the country and the appellant produced letters of good character from prominent members of the East Indian community. The Board concluded that the appellant's financial achievements, good work record and character references indicated that he was an asset to the community in which he lived and, accordingly, concluded that the appellant should not be removed from Canada.

*Min. of Employment & Immigration v. Mercier*, Imm. App. Bd., Montreal, Doc. No. 79-1243, September 16, 1980.

The Board held that a visa is no more than a stamp on a piece of paper, issued outside Canada, which may give the holder a colour of right to enter Canada, either as a visitor or immigrant. A change in marital status is a material fact which must be disclosed to the Canadian immigration authorities if it occurs before permanent residence is actually granted. By failing to disclose her marriage upon arrival in Canada, the

appellant misrepresented a material fact and thus brought herself within section 27(1)(e). Because the Minister had appealed, the provisions of section 75(3) gave the appellant an automatic right of appeal on equitable grounds. The appellant had gradually established herself in Canada, had a stable job and had not committed any criminal offence or infraction of the Immigration Act since the granting of landing. Members of the appellant's immediate family in Canada were in a position to help her, if necessary, and the appellant had a minor child for whom she was the sole provider and who was a Canadian citizen by birth. This child was in delicate physical health and required regular attention from a competent doctor. Having regard to all the evidence, the Board allowed the appellant's appeal on equitable grounds.

*De la Cruz v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T-79-9373, August 12, 1980.

The appellant had no family in Canada, no major assets and held no position of responsibility in connection with her employment. She had been considerably more successful in her home in the Philippines and the Board concluded in all the circumstances that her roots were there and not in Canada. Accordingly, they found there were no considerations that would merit the granting of special relief.

*Simpson v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9467, April 17, 1980.

The appellant was convicted of robbery involving a shotgun and sentenced to 3 years' imprisonment; he sought a stay of the deportation order. The appellant's mother testified that she was willing to have the 22-year-old appellant live with her and support him. The Board noted that the appellant had no close relatives living in Jamaica and that his conviction was an isolated one, although the offence was serious. The deportation order was stayed for a period of 2 years from the date of the appellant's release on parole.

*Baky v. Min. of Employment & Immigration*, [1980] 2 F.C. 35 (Fed. C.A.).

A decision of the Immigration Appeal Board dismissing the applicant's motion to reopen his appeal was set aside because the Board stated it had never and would not exercise its jurisdiction to grant special relief owing to consequences arising from the applicant's failure to meet his military obligations in his homeland. The Court held that the statement reflected a failure to exercise jurisdiction which amounted to a complete denial of jurisdiction.

*Devrim v. Min. of Employment & Immigration*, Imm. App. Bd., Calgary, Doc. No. 78-6192, April 24, 1979.

The Board found that the appellant acted in good faith by stating she was engaged at her initial interview and disclosing her marriage at her second interview in Ankara, Turkey. At her second interview the appellant received some misleading information and, at the airport in Toronto, she was not examined in her native language and did not understand the contents of her immigrant record card. The Board held that section 27(1)(e) of the Act imposed an obligation of absolute liability and, thus, the defence of due diligence was not available. Under section 72(1)(b) of the Act the Board allowed the appeal, finding that the appellant acted in good faith but was seriously misled by information given

to her at the embassy in Ankara and seriously disadvantaged by the absence of a Turkish interpreter at the airport on her arrival.

*Reid v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9170, February 15, 1979.

Notwithstanding evidence that the appellant had established himself satisfactorily in Canada and had adapted to the country, the Board did not grant special relief. The Board could not condone or overlook the calculated deceit by means of which the appellant entered Canada and gained acceptance for permanent residence. In bringing his wife and four children to Canada without proper authorization the appellant was, in effect, gambling that he would ultimately be permitted to remain in Canada permanently. The Board noted that in accepting immigrants for permanent residence, the department must accept any sworn statements of the applicant and, therefore, the honesty of the applicant was essential to the proper implementation of immigration policies. In this case the appellant's brother had falsely represented that the appellant was single on the nomination application and the appellant made this representation on his application for admission to Canada as a permanent resident.

*Hilario v. Min. of Manpower & Immigration*, [1978] 1 F.C. 697 (Fed. C.A.).

The test by which the exercise of a statutory discretion must be judged was that it was exercised *bona fide*, uninfluenced by irrelevant considerations, and not in an arbitrary or illegal manner. A Court is not entitled to interfere merely because it would have exercised the discretion differently.

*Toan Cong Vu v. Min. of Manpower & Immigration*, [1973] F.C. 529 (Fed. C.A.).

In rendering its decision, the Board posed a number of questions without answering them. The relevance of the answers was not apparent and, thus, the decision was open to the objection that it had been based on irrelevant considerations. The Court held that the Board should have determined, first, whether there existed any compassionate or humanitarian considerations and, second, whether those considerations warranted the granting of special relief. In failing to so consider the matter, the Board had failed to exercise its statutory jurisdiction.

*Grillas v. Min. of Manpower & Immigration*, [1972] S.C.R. 577 (S.C.C.).

Until a deportation order has actually been executed, the Board is entitled to reopen an appeal, hear new evidence, revise its former decision, and exercise its discretion to allow an appellant to remain in Canada because of compassionate or humanitarian considerations. The Board did not err in law in accepting an argument of counsel for the respondent in its judgment. The Court distinguished between acceptance of statements from counsel as argument and acceptance of statements from counsel as evidence, the latter being unacceptable. When a decision is made to reopen an appeal, it is not necessary that the new hearing be held before the same panel that made the original decision.

### **Subsection (2)**

*Canada (Min. of Employment & Immigration) v. Wong* (1993), 153 N.R. 237 (Fed. C.A.).

A Canadian citizen made a sponsorship application for her father and sister, the



latter in the category of the father's single dependant daughter. Before the issuance of the immigration visas, the father died. Unaware of this event, Canadian immigration authorities issued visas to both sponsorees. At the point of entry to Canada, the sponsoree daughter initially lied to a Canadian immigration officer, but ultimately produced her father's death certificate. On inquiry she was ordered excluded.

The Appeal Division held that it had jurisdiction to hear the appeal since at the time of landing the sponsoree-sister was in possession of a valid immigrant visa and went on to exercise its compassionate discretion in her favour.

Where an element upon which the issuance of a visa is based subsequently ceases to exist and where the principal reason for the issuance of a visa ceased to exist before its issuance, such a visa cannot be said to be a valid immigrant visa.

The appeal was allowed and the Board's decision set aside for want of jurisdiction.

### ***Subsection (3)***

*Desir v. Canada (A.G.)*, Fed. T.D., Doc. No. T-1240-85, July 5, 1985.

The words "valid visa" in this section cover both someone holding an immigrant visa and someone holding a visitor's visa. Accordingly, this section confers a right of appeal on both groups where a removal order has been made.

*Min. of Employment & Immigration v. Dmitrovic*, Fed. C.A., Doc. No. A-45-81, February 8, 1983.

The facts of this case are contained in the Immigration Appeal Board decision of September 17, 1980. Dmtirovic entered Canada as a visitor. He attempted to claim refugee status in the Yukon Territories and in Vancouver while in status. On each occasion he was told that he must either leave the country to make that claim or overstay his visitor's visa and make the claim at the resulting inquiry. Dmtirovic overstayed his visitor's visa and made a claim for refugee status which was accepted by the Minister. No Minister's permit was issued upon the determination that Dmtirovic was a Convention refugee with the result that the inquiry continued to a conclusion notwithstanding the determination and Dmtirovic was ordered deported. The Immigration Appeal Board allowed his appeal and quashed the deportation order. This decision was overruled upon the appeal of the Minister and the matter was sent back to the Immigration Appeal Board for consideration under section 72(2)(d) of the Immigration Act. The determination by the Minister that a person is a Convention refugee does not confer on that person a status of some undefined nature. It gives him rights such as not to be returned to a country where his life or freedom would be threatened, a right granted by virtue of section 55 of the Act and the right to appeal a removal order pursuant to section 72(2)(a) and (3) of the Act.

*Min. of Employment & Immigration v. La Rose*, Imm. App. Bd., Toronto, Doc. No. 79-9284, November 28, 1979.

The issue was whether a stamp appearing on the respondent's passport was a valid visa. The Board held that the stamp was likely made on the passport by a visa officer. However, the Court held that when section 72 of the Act makes reference to a "valid visa," it is referring to either a non-immigrant visa authorizing entry into Canada or an immigrant visa authorizing admission as a permanent resident.

*McConnel v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 78-9201, March 20, 1979.

The Board, being a creature of statute, must derive its jurisdiction from the statute creating it. Section 72(2) did not provide for an appeal from the issuance of a departure notice and, accordingly, the Board was without jurisdiction to entertain the appeal.

*Hilario v. Min. of Manpower & Immigration*, [1978] 1 F.C. 697 (Fed. C.A.).

The test by which the exercise of a statutory discretion must be judged was that it was exercised *bona fide*, uninfluenced by irrelevant considerations, and not in an arbitrary or illegal manner. A Court is not entitled to interfere merely because it would have exercised the discretion differently.

#### **Subsection (4)**

*Chiarelli v. Canada (Min. of Employment & Immigration)*, 16 Imm. L.R. (2d) 1, [1992] 1 S.C.R. 711.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of five years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to the SIRC. The report indicated that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of the SIRC and directed the appellant Minister to issue a certificate under section 82(1) with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

The SIRC conducted its investigation and hearing first by reading a document entitled "Statement of Circumstances" as well as two summaries of information. The first day's hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy

Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition imposed by section 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident's right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an Immigration Appeal Board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the appeal board's decision or substitute his decision as he deemed just and proper. The 1966 *White Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest



to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision as to whether to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

#### **PERMANENT RESIDENT DOCUMENT TO BE ISSUED — Stay.**

**70.1 (1)** Subject to subsection (2), where a person appeals a refusal under subsection 70(1.1) and the appeal is allowed, the Minister shall provide the person with a document that establishes, in the absence of proof to the contrary, that the person is a permanent resident.

**(2)** Where the Minister has been notified by the Appeal Division that an appeal under subsection 70(1.1) has been allowed and the Minister makes an application for leave to commence an application for judicial review, the application of subsection (1) shall be stayed until the application is disposed of and, where leave is granted, until the judicial review proceeding has been heard and disposed of and all appeals therefrom have been heard and disposed of or the time normally limited for filing such appeals has elapsed. [1992, c. 49, s. 66. Not in force at date of publication.]

#### **APPEAL BY MINISTER.**

**71.** The Minister may appeal to the Appeal Division on any ground of appeal that involves a question of law or fact, or mixed law and fact, from a decision by an adjudicator that a person who was the subject of an inquiry is a person who may be granted admission or is not a person against whom a removal order or conditional removal order should be made. R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**REOPENING OF INQUIRY — Minutes and adjudicator's assessment.**

72. (1) The Appeal Division may order that an inquiry that has given rise to an appeal be reopened before the adjudicator who presided at the inquiry or any other adjudicator for the receiving of any additional evidence or testimony.

(2) The adjudicator who presides at an inquiry reopened under subsection (1) shall file a copy of the minutes of the reopened inquiry, together with the adjudicator's assessment of the additional evidence or testimony, with the Appeal Division for its consideration in disposing of the appeal. R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**Subsection (2)**

*Fleming v. Canada (Min. of Employment & Immigration)* (1987), 4 Imm. L.R. (2d) 207 (Fed. C.A.).

This case was a section 28 application to review and set aside a decision of the Immigration Appeal Board. The Board had dismissed the applicant's motion requesting the Board to set aside its decision dismissing the applicant's appeal from a deportation order and reopen the appeal in order to permit the applicant to adduce further evidence in support of a plea that the Board exercise its equitable jurisdiction in the applicant's favour.

The case illustrates the difference between additional evidence and new evidence.

The party seeking to adduce additional evidence must satisfy the Board that:

1. He could not have obtained such evidence by reasonable diligence before the original hearing of the appeal; and
2. The evidence sought to be introduced is of such a nature that, if satisfactorily proved, it would furnish a sufficient reason for the reconsideration of the Court's original disposition of the appeal.

New evidence is evidence which was not in existence at the time of the hearing of the appeal. It must be examined by the Board to determine whether or not it was of sufficient weight in relation to the other evidence in the case that the Board should exercise its discretion and re-open the case.

The application was granted. The Immigration Appeal Board had failed to recognize that some of the applicant's material was new evidence as opposed to additional evidence and, accordingly, had not applied the relevant test in dismissing the applicant's application.

*Fogel v. Min. of Manpower & Immigration*, [1975] F.C. 121 (Fed. C.A.).

The applicant was not denied natural justice when a member of the Board that dismissed the applicant's appeal from a deportation order sat on the Board that refused to reopen the inquiry that resulted in the deportation order.

**DISPOSITION OF APPEAL — *Idem* — Deemed appeal in certain cases where appeal allowed.**

73. (1) The Appeal Division may dispose of an appeal made pursuant to section 70

- (a) by allowing it;
- (b) by dismissing it;
- (c) in the case of an appeal pursuant to paragraph 70(1)(b) or 70(3)(b), respecting a removal order, by directing that execution of the order be stayed; or
- (d) in the case of an appeal made pursuant to paragraph 70(1)(b) or 70(3)(b) respecting a conditional removal order, by directing that execution of the order on its becoming effective be stayed.

(2) The Appeal Division may dispose of an appeal made pursuant to section 71

- (a) by allowing it and making the removal order or conditional removal order that the adjudicator who was presiding at the inquiry should have made; or
- (b) by dismissing it.

(3) Where the Appeal Division disposes of an appeal made pursuant to section 71 by allowing it and making a removal order or conditional removal order against the person concerned, that person shall, where the person would have had an appeal pursuant to this Act if the order had been made by an adjudicator after an inquiry, be deemed to have made an appeal to the Appeal Division pursuant to paragraph 70(1)(b) or 70(3)(b), as the case may be. 1976-77, c. 52, s. 75; R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**Subsection (1)**

*Toth v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-870-88, October 28, 1988.

The appellant was ordered deported under the old *Immigration Act* (R.S.C. 1952, c. 325). Various stays of the execution of that order were in effect until June 25, 1980, when the Board cancelled the stay of the deportation order and directed that it be executed as soon as possible. On September 1, 1987, a vice-chairman of the Board allowed the appellant's application to review the deportation order. The appellant at the review hearing expressly declined to challenge the validity of the deportation order. The only issue was whether the Board should exercise its so-called "equitable jurisdiction" to stay once again the execution of the order. On March 29, 1988, the Board declined to order a further stay of execution of the deportation order and an appeal was taken from that decision. In the absence of a statutory power to reconsider a final order, a tribunal has no such power except:

1. Where there has been an error in drawing up the order;



2. Where there has been an error in expressing its manifest intention; or
3. Where there has been a manifest denial of natural justice in the proceeding that resulted in the order.

None of those exceptions was held to apply in the present case. Because the stay was not subsisting in 1988, the previous legislation was not held to permit the Board to reconsider the validity of the deportation order. The power to quash a deportation order must be exercised in conjunction with the cancellation of the stay and not by way of an independent reconsideration of the validity of the deportation order. There was, accordingly, no subsisting stay which would have provided a basis for jurisdiction to review the validity of the deportation order.

*Baky v. Min. of Employment & Immigration*, [1980] 2 F.C. 35 (Fed. C.A.).

A decision of the Immigration Appeal Board dismissing the applicant's motion to reopen his appeal was set aside because the Board stated it had never and would not exercise its jurisdiction to grant special relief owing to consequences arising from the applicant's failure to meet military obligations in his homeland. The Court held that the statement reflected a failure to exercise jurisdiction which amounted to a complete denial of jurisdiction.

*Hilario v. Min. of Manpower & Immigration*, [1978] 1 F.C. 697 (Fed. C.A.).

The test by which the exercise of a statutory discretion must be judged was that it was exercised *bona fide*, uninfluenced by irrelevant considerations, and not in an arbitrary or illegal manner. A Court is not entitled to interfere merely because it would have exercised the discretion differently.

*Wilby v. Min. of Manpower & Immigration*, [1975] F.C. 636 (Fed. C.A.).

A decision that is subject to attack as having been made without procedural fairness has continuing legal effect until, at the instance of the aggrieved party, it is found by a competent Court to be defective; in this case it may be nullified *ab initio* by judgment of the Court. Where the Board exercised power under this paragraph, there is no retroactive effect in terms of the validity of the order.

*Lal v. Min. of Manpower & Immigration*, [1972] F.C. 1017 (Fed. C.A.).

The Immigration Appeal Board may reopen a hearing only for the purpose of giving further consideration to granting equitable relief. Where there is an objection to the fairness of the hearing, the proper remedy is by way of an appeal from the order dismissing the appeal.

### **Subsection (2)**

*Min. of Employment & Immigration v. Tighe*, Imm. App. Bd., Montreal, Doc. No. M83-1128E, February 17, 1984.

The Minister appealed under section 73 of the Immigration Act. The adjudicator had decided that the respondent was not a person described in section 27(2)(e) of the Immigration Act. As a result of this finding the adjudicator did not make a removal order against the respondent or issue a departure notice to him. The respondent had claimed to be a Canadian citizen at the inquiry. This claim was not disposed of due

to the adjudicator's decision that the respondent was not described in section 27(2)(e) of the Act. The Board ruled that it did not have the power to allow the Minister's appeal pursuant to section 75(2) of the Act because it could not make a removal order against the respondent. The removal order could not be made because the respondent's claim to Canadian citizenship had never been resolved in accordance with the provisions of the Act. Accordingly, the Minister's appeal was dismissed.

*Cembranos-Alvarez v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-267-82, June 6, 1983.

The Immigration Appeal Board may not allow an appeal by the Minister and issue a removal order under this subsection unless it is satisfied on the basis of the evidence before it that the adjudicator should have made such a removal order rather than issue a departure notice.

*Gyali v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. 79-9030, July 10, 1979.

The Board quashed a deportation order made January 10, 1979, and ordered the applicant deported on grounds that the Board felt had been disclosed at the inquiry. The deportation order was dated July 10, 1979. The Board felt there was evidence before the adjudicator which would have justified a removal order under section 27(1)(e) and that grounds for removal should have been included in the order made by the adjudicator. It is interesting to note that the Board exercised its jurisdiction under section 72(1)(b) and the removal order made by the Board was then quashed by the Board.

### ***Subsection (3)***

*Canada (Min. of Employment & Immigration) v. De Decaro*, [1993] 2 F.C. 408, 155 N.R. 129, 103 D.L.R. (4th) 564 (C.A.).

In October 1988 a visa officer issued an immigrant visa to Ignazio De Decaro. He also issued an immigrant visa to two dependants who were to accompany Mr. De Decaro, namely the respondent and her daughter. Ignazio De Decaro died before coming to Canada. The respondent did come and arrived at Dorval on July 11, 1989 accompanied by her daughter and another child, who was born in the U.S. after Ignazio De Decaro's death. This child had never obtained a visa to Canada.

The respondent then applied for landing for herself and her two children. This was denied on the ground that the respondent's admission contravened section 19(2)(d) of the Immigration Act because the respondent did not meet the requirements of section 9(1) of the Act.

The adjudicator found that when the respondent applied for admission to Canada, she held a valid immigrant's visa since her visa had not been revoked by the proper authorities. The adjudicator found that the respondent's husband's death did not automatically invalidate the visa. Further, the adjudicator found that there was no need to refer to section 12 of the Regulations because that provision did not enact a condition of admission, consequently its infringement did not mean the respondent could not be admitted.

The Appeal Division of the I.R.B. dismissed the Minister's appeal on the basis that the respondent, before appearing at a port of entry, had duly obtained an immigrant

visa which had never been revoked or cancelled by the proper authorities and thus the respondent had the right to be admitted to Canada unless she was inadmissible on some other ground than the lack of a valid visa.

The Minister's appeal to the Court of Appeal was allowed. Pratte J.A. held that the definition of "accompanying dependant" illustrated that the visa issued to a person in this class was of a very special type which was issued solely to enable its holder to accompany or follow another person to Canada. The holder of such a visa who applied for admission without the other person accompanying or preceding him or her into Canada did not therefore meet the requirements of section 9(1) of the Act.

Further, after her husband's death the respondent became inadmissible by virtue of section 12 of the Regulations. Her marital status had changed since she obtained her visa and in order to be admitted to Canada she had to establish not only that she was eligible, but also that she met all the conditions for obtaining a visa. The respondent never discharged this burden of proof.

Marceau J.A. agreed that the decision of the Appeal Division should be set aside. He saw no reference in the Act or Regulations to visas which become invalid, are revoked or become ineffective. The technique in his view used to cover cases of changes in the immigrant's status between the time the visa is issued and the time he or she arrives at the Canadian border is contained in section 12 of the Regulations. In his view, issuing an immigrant visa is not the granting of landing. Such issuance simply means that the visa officer has formed the opinion that the applicant meets the requirements of the Act and Regulations for admission to Canada. The visa is evidence of a conclusion by an immigration officer whose function is to determine from outside Canada whether applicants are admissible and that conclusion will usually be accepted by his or her colleague at the port of entry. However, the rule is still that a foreign national arriving in Canada with a view to residing here must satisfy the immigration officer of his admissibility at the port of entry. Section 12 of the Regulations imposes on an immigrant a duty to disclose any change in the facts which may have influenced the issuing of the visa and if there has been such a change, it requires the immigrant to meet new requirements. The visa is not void, but the visa in itself does not confer the right of entry. It is the new requirements of section 12 of the Regulations that must be met.

In Marceau J.A.'s view the respondent could not establish that she met the requirements of section 12 since she was granted a visa in consideration of her husband's presence. The adjudicator accordingly was wrong to think that she met the conditions of admission set out by the Regulation and the Appeal Division could not confirm the adjudicator's finding on the ground that the Minister had not discharged the burden of proving that the respondent was inadmissible or that her visa had been cancelled, as the Minister was under no burden of proof and cancellation of a visa as a concept does not exist.

Given that the Court intended to allow the appeal, it then had to consider section 73(3). The majority was of the view that the respondent before her husband's death possessed a valid visa. However, after that death it was impossible for the condition attached to the visa to be performed so that the visa ceased to have any validity. Accordingly, section 73(3) conferred no right of appeal to the Appeal Division on the respondent.

Marceau J.A. was of the view that the respondent was in possession of a valid visa and that the matter should be returned to the Appeal Division as it was still under a



duty to consider whether on compassionate or humanitarian grounds the respondent should not be removed from Canada.

***WHERE APPEAL ALLOWED — Terms of stay of execution — Appeal Division may amend terms or cancel direction.***

**74. (1) Where the Appeal Division allows an appeal made pursuant to section 70, it shall quash the removal order or conditional removal order that was made against the appellant and may**

- (a) make any other removal order or conditional removal order that should have been made; or**
- (b) in the case of an appellant other than a permanent resident, direct that the appellant be examined as a person seeking admission at a port of entry.**

**(2) Where the Appeal Division disposes of an appeal by directing that execution of a removal order or conditional removal order be stayed, the person concerned shall be allowed to come into or remain in Canada under such terms and conditions as the Appeal Division may determine and the Appeal Division shall review the case from time to time as it considers necessary or advisable.**

**(3) Where the Appeal Division has disposed of an appeal by directing that execution of a removal order or conditional removal order be stayed, the Appeal Division may, at any time,**

- (a) amend any terms and conditions imposed under subsection (2) or impose new terms and conditions; or**
- (b) cancel its direction staying the execution of the order and**
  - (i) dismiss the appeal and direct that the order be executed as soon as reasonably practicable, or**
  - (ii) allow the appeal and take any other action that it might have taken pursuant to subsection (1). 1976-77, c. 52, s. 76; R.S.C. 1985 (4th Supp.), c. 28, s. 18; 1992, c. 49, s. 67.**

***Subsection (2)***

*Eltassi v. Canada (Min. of Employment & Immigration)*, 9 Imm. L.R. (2d) 96, [1989] 3 F.C. 444, 30 F.T.R. 91 (Fed. T.D.).

In January 1987, the Immigration Appeal Board stayed the execution of a removal order against the applicant. The Minister ultimately applied to the Board for an order dismissing the applicant's appeal and directing that the removal order against him be executed. At the hearing of that motion, counsel for the applicant objected to the fact that the Board, in considering that application, was different than the panel which directed that the removal order be stayed. The applicant argued that he was entitled, on a review of his case, to the same Board panel that originally heard his appeal. This argument was rejected. The appropriate body to consider any review of the 1987 order is the

Immigration Appeal Division. The original panel does not remain seized of the matter after ordering that the removal order be stayed.

*Canada (Min. of Employment & Immigration) v. Lewis* (1988), 4 Imm. L.R. (2d) 31, 87 N.R. 192 (Fed. C.A.).

The respondent Lewis, a United States citizen, was admitted to Canada as a permanent resident in 1981, and ordered deported in 1983. On his appeal, the Immigration Appeal Board stayed the execution of the removal order until February 20, 1989. By an application, dated February 26, 1986, the Minister sought an order dismissing the appeal and directing that the removal be executed as soon as reasonably practicable.

The Board correctly appreciated that the process requires that successive decisions must be made. Firstly, the Board must decide whether a review under section 76(2) of the Act is advisable. If it decides a review is not advisable, that is the end of the process. If a review is advisable, the Board must decide which, if any, of the actions authorized by section 76(3) are appropriate.

The decision to initiate the process was entirely within the Board's discretion. There was no error for the Board to limit the evidence it would accept from an application for review to that submitted in a timely fashion. It is obvious that a myriad of circumstances, not contemplated in a stay order, could arise that would impel the Board in a proper exercise of its discretion to review a case and vacate a stay. Further, the Board did not err in refusing to consider a circumstance that was in existence at the time the stay was originally imposed. The finding by the Board was that the warrant, in this case, could, with reasonable diligence, have been brought into evidence at the original hearing. Further, the Board found that the existence of the warrant had been the subject of extensive press comment, and yet the Minister had made no effort to obtain evidence of the warrant prior to the initial hearing. Thus, the Board was within its jurisdiction in refusing to consider it.

*Kumar v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1533-83, November 29, 1984.

The Board is entitled to exercise its discretion by refusing the adjournment of the hearing sought by the appellant pending disposition of outstanding criminal charges, and to proceed with the review. If it does so, the existence of the charges ought not to play any part in the decision to grant, or not grant, the extension of the stay being asked for. Where it is doubtful that the existence of the criminal charges was ignored, the decision of the Board will be set aside and the matter referred back to the Board for a rehearing.

### **Subsection (3)**

*Eltassi v. Canada (Min. of Employment & Immigration)*, 9 Imm. L.R. (2d) 96, [1989] 3 F.C. 444, 30 F.T.R. 91 (Fed. T.D.).

For digest, see section 74, subheading *Subsection (2), supra*.

*Canada (Min. of Employment & Immigration) v. Lewis* (1988), 4 Imm. L.R. (2d) 31, 87 N.R. 192 (Fed. C.A.).

For digest, see section 74, subheading *Subsection (2), supra*.

**RETURN TO CANADA FOR HEARING OF APPEAL.**

75. Where a person against whom a removal order or conditional removal order has been made is removed from or otherwise leaves Canada and informs the Appeal Division in writing of his desire to appear in person before the Appeal Division on the hearing of the appeal against the order, the Appeal Division may, if an appeal has been made, allow the person to return to Canada for that purpose under such terms and conditions as it may determine. 1976-77, c. 52, s. 77; R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**APPEAL DECLARED ABANDONED.**

76. Where a person against whom a removal order or conditional removal order has been made files an appeal against that order with the Appeal Division but fails to communicate with the Appeal Division upon being requested to do so or fails to inform the Appeal Division of the person's most recent address, the Appeal Division may declare the appeal to be abandoned. 1976-77, c. 52, s. 78; R.S.C. 1985 (4th Supp.), c. 28, s. 18.

**Appeals by Sponsors**

**WHERE SPONSORED APPLICATIONS FOR LANDING MAY BE REFUSED** — *Sponsor to be informed* — *Appeals by sponsors* — *Exception* — *Information obtained in confidence* — *Delay* — *Disposition by Appeal Division* — *Where appeal allowed* — *Stay*.

77. (1) Where a person has sponsored an application for landing made by a member of the family class, an immigration officer or visa officer, as the case may be, may refuse to approve the application on the grounds that

- (a) the person who sponsored the application does not meet the requirements of the regulations respecting persons who sponsor applications for landing, or
- (b) the member of the family class does not meet the requirements of this Act or the regulations,

and the person who sponsored the application shall be informed of the reasons for the refusal.

(2) Notwithstanding subsection (1), where an application for landing made by a member of the family class is refused on the grounds that the member of the family class is a person described in any of paragraphs 19(1)(c.1) to (g), (k) and (l), the person who sponsored the application shall be informed of those grounds but not of the reasons on which those grounds are based.

(3) Subject to subsection (3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to



subsection (1) may appeal to the Appeal Division on either or both of the following grounds:

- (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
- (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

(3.1) No appeal lies to the Appeal Division under subsection (3) on any grounds referred to in paragraph (3)(a) where the Canadian citizen or permanent resident who has sponsored the application for landing that is refused pursuant to subsection (1) resides in a province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for establishing and applying financial criteria in relation to sponsors if

- (a) the refusal is based on the rejection of the person's application for sponsorship by an official of that province on the grounds that the person failed to meet those criteria or failed to comply with any prior undertaking concerning the sponsorship of any application for landing; and
- (b) the laws of that province provide the person with a right to appeal the rejection of the person's application for sponsorship.

(3.2) With respect to any appeal referred to in subsection (3),

(a) the Minister may make an application to the Federal Court — Trial Division, *in camera*, and in the absence of the appellant and any counsel representing the appellant, for the non-disclosure to the appellant of information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof;

(b) the Court shall, *in camera*, and in the absence of the appellant and any counsel representing the appellant,

- (i) examine the information, and
- (ii) provide counsel representing the Minister with a reasonable opportunity to be heard as to whether the information should not be disclosed to the appellant on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) the information shall be returned to counsel representing the Minister and shall not be considered by the Appeal Division in making its determination on the appeal if, in the opinion of the Court, the disclosure of the information to the appellant would not be injurious to national security or to the safety of persons; and

(d) if the Court determines that the information should not be disclosed to the appellant on the grounds that the disclosure would be injurious to national

security or to the safety of persons, the information shall not be disclosed but may be considered by the Appeal Division in making its determination.

(3.3) Where an application referred to in paragraph (3.2)(a) is made, the appeal to which the application relates shall not be commenced or, if commenced, shall be adjourned, until the Federal Court — Trial Division has made a determination of the application.

(4) The Appeal Division may dispose of an appeal made pursuant to subsection (3) by allowing it or by dismissing it, and shall notify the Minister and the person who made the appeal of its decision and the reasons therefor.

(5) Subject to subsection (6), where the Minister has been notified by the Appeal Division that an appeal has been allowed pursuant to subsection (4), the Minister shall cause the review of the application to be resumed by an immigration officer or a visa officer, as the case may be, and the application shall be approved where it is determined that the person who sponsored the application and the member of the family class meet the requirements of this Act and the regulations, other than those requirements on which the decision of the Appeal Division has been given.

(6) Where the Minister has been notified by the Appeal Division that an appeal has been allowed pursuant to subsection (4) and the Minister makes an application for leave to commence an application for judicial review in respect of that decision, the application of subsection (5) shall be stayed until the application is disposed of and, where leave is granted, until the judicial review proceeding has been heard and disposed of and all appeals therefrom have been heard and disposed of or the time normally limited for filing such appeals has elapsed. 1976-77, c. 52, s. 79; 1984, c. 21, s. 82; R.S.C. 1985 (2d Supp.), c. 10, s. 6; R.S.C. 1985 (4th Supp.), c. 28, s. 33; 1992, c. 49, s. 68.

### *Subsection (1)*

*Nagy v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1375-93, March 11, 1994.

The applicant sought to review a decision holding that there were insufficient humanitarian and compassionate grounds for allowing an application for permanent residence within Canada. The immigration officer did not give reasons for refusing to recommend that the Minister exercise his discretion under section 114(2). The case law has been consistent and clear to the effect that reasons are not required in this context. Section 77 only requires reasons to be given to a person who sponsors a family member's application for permanent residence where that application is refused. The matter, in this case, had nothing to do with Luis Nagy, the applicant's sponsor, since he was not part of the section 114(2) application and therefore no reasons were required.

*Lidder v. Canada (Min. of Employment & Immigration)* (1992), 136 N.R. 254 (Fed. C.A.).

The respondent promised his dying sister that he would take care of her children upon her death, which occurred in 1982. He submitted an undertaking of assistance (family class) to sponsor his now orphaned nephew. At the time the respondent submitted his undertaking of assistance the nephew was 17 years of age. By the time the nephew received the application for permanent residence from the Canadian High Commission in Delhi, the nephew was already 18 years of age. The respondent was informed that the nephew's application was refused due to the fact that he was 18 years of age when his application was received.

The Court noted that there are four kinds of estoppel available: estoppel by matter of record, estoppel by deed, estoppel by representation and promissory estoppel. The branch of estoppel at issue in this case was estoppel by representation. In order for the doctrine of estoppel by representation to apply there must be the following elements:

1. a representation of fact made with the intention that it be acted upon or that a reasonable person would assume was intended to be acted upon;
2. the representee must act upon the representation; and
3. the representee must have altered his position in reliance upon the representation and thereby suffered a prejudice.

Neither the doctrine of estoppel nor the related doctrine of reasonable or legitimate expectation creates a substantive right. They are part of the rules of procedural fairness which govern administrative bodies. A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can those undertakings cause the public authority to forego the requirements of the law. The effective date of a sponsored application is the date of the filing of the application itself. At that point in time the nephew was over the age of 18 years and could not be sponsored as a member of the family class. Accordingly, the respondent had not sponsored an undertaking by a member of the family class and could not appeal to what was then the Immigration Appeal Board, and thus the Board was without jurisdiction to hear and in this case allow the respondent's appeal. Accordingly, the decision of the Board was quashed. Costs were awarded against the Crown on a solicitor and client basis.

*McKay v. Min. of Employment & Immigration* (1988), 5 Imm. L.R. (2d) 287 (Imm. App. Bd.).

The appellant appealed the refusal to approve the sponsored application of his mother, her daughter and her son. The basis of the refusal was that the mother had no intention to come to Canada as a permanent resident, but was merely applying to facilitate the admission to Canada of her children. At the time of the interview of the mother, she affixed her mark on an application for permanent residence. On the same date, she affixed her mark to a Statutory Declaration that was inconsistent with the application for permanent residence. There was nothing to indicate that the visa officer had attempted to resolve the apparent contradiction between the 2 documents before making a decision. Furthermore, the appellant, who was also interviewed by immigration authorities, was not given an opportunity to explain the 2 documents. Thus, the refusal was held to be not valid in law. The mother was found to have an intention to reside permanently in Canada.



*Sashi v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1274-87, July 9, 1987.

The applicant sought to quash a decision of a visa officer in India refusing sponsorship applications for the applicant's mother and his adopted daughter. The visa officer refused to accept the sponsorship of the daughter because, as a result of his inquiries, he concluded that the provisions of the Hindu Adoptions and Maintenance Act had not been complied with. It was held that a visa officer has not only a right but a duty to ensure that all immigrants meet the requirements of the Act and Regulation. In this case, that included making certain that the sponsored child had been legally adopted within the meaning of section 2(1) of the Regulation. The officer's decision was not reached improperly or without justification. The officer did reach a conclusion that involved an interpretation of Hindu law, and he ought to have afforded the applicant some opportunity for counter-argument. However, the relief sought in this case, *i.e.*, *certiorari* and *mandamus*, was discretionary, and in all the circumstances the motion was dismissed.

*Pangli v. Canada (Min. of Employment & Immigration)* (1987), 4 Imm. L.R. (2d) 266, 81 N.R. 216 (Fed. C.A.).

This was an appeal with leave from a decision of the Immigration Appeal Board dismissing the appellant's appeal from the refusal of the Minister to approve the application for landing of the appellant's father, mother, and two brothers. The basis of the refusal was a statutory declaration from the appellant's father indicating an intention to go to Canada to visit for one year. This statutory declaration was contradicted by the application for permanent residence also completed by the appellant's father. The appeal was allowed. In cases where the written record is not decisive but rather is ambiguous, officers charged with making a section 79(1) determination ought to take steps to resolve the conflict and ambiguity. In this case, a further questioning of the appellant's father with a view to affording him the opportunity to state finally and unequivocally what his intention was, was required. Absent any evidence that such a course of action was pursued, the determination, pursuant to section 79(1), could not be allowed to stand. The Court did not comment on whether a person could hold primary and secondary intentions with respect to coming to Canada.

*Canada (Min. of Employment & Immigration) v. Singh* (1987), 2 Imm. L.R. (2d) 44 (Fed. C.A.).

This was an appeal to the Federal Court of Appeal from a decision of the Immigration Appeal Board allowing the respondent Pal Singh's appeal from the refusal by an immigration officer to approve the application for landing made by the wife and children of the respondent.

The Immigration Appeal Board, from whose decision this appeal was taken, had held that the letter of refusal had not properly informed the respondent of the reasons for such refusal. The Board considered the refusal letter by itself and in complete isolation from the evidence contained in the record and, therefore, erred in law in concluding that the refusal letter was not adequate.

The reasons were formulated in the language of the Regulation but were readily intelligible and sufficient for the immediate purpose of allowing the sponsor to determine whether to appeal. Further, the reasons were adequate enough to allow the sponsor, soon after receiving them, to appeal the immigration officer's decision promptly. The Board,

at the conclusion of the hearing, remained unconvinced that Pal Singh was married to the woman who claimed to be his wife and that her offspring were his own children. This is the same basis upon which the letter of refusal had been issued. Further, the Board's decision did not say in what respect the letter of refusal was defective; and, further, in assessing the validity of the immigration officer's decision, the Board was entitled to consider an inter-departmental memorandum, which the officer had prepared and which more fully expounded his reasons for refusal.

The appeal was allowed, the decision of the Immigration Appeal Board was set aside and the decision of the immigration officer refusing the application was held to have been made in accordance with the law.

*Reyes de Jesus v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 217 (Imm. App. Bd.).

This was an appeal from the refusal of a sponsored application for landing. The appellant was seeking to sponsor his mother. The application was refused on the basis that the mother had not satisfied the immigration officer that she complied with the definition of "immigrant" given in section 2(1) of the Immigration Act. This decision was based upon previous statutory declarations, which the mother had filed when she was seeking visitor's visas to come to Canada. These declarations denied an intention to reside permanently in Canada. This was found to be unfair because the declarations from the previous applications, upon which the officer relied, were not raised with the mother when she was interviewed. The Board found that it was the interviewing officer's duty to consider the mother's intention at the time of the interview and to allow her to explain the previous declarations. The Board also suggested that it would be sufficient if the mother's intention to reside permanently in Canada was formulated after the interview, which resulted in her application being rejected, but before the hearing of the sponsor's appeal.

*Vadsaria v. Canada (Secretary of State for External Affairs)* (1986), 7 F.T.R. 299 (Fed. T.D.).

The initial application of Mumtaz Vadsaria to sponsor her mother and her sisters was refused because the evidence submitted to prove the relationship was found to be false. The applicant appealed to the Immigration Appeal Board, which found that, in fact, one of the sponsors, Dhault Bhimani, was the mother of the applicant. This decision was binding upon the respondents, and there was, therefore, no longer any determination to be made or any proof to be required of that relationship. The respondent, however, was still free to consider whether there was evidence that the persons included as sisters in the application were proven to be such. The actions of the respondents in withholding such a finding, until acceptable proof was put forward, was in accordance with the Act and Regulation and not subject of an order in the nature of *mandamus* as set out in section 18 of the Federal Court Act.

*Mundi v. Canada (Min. of Employment & Immigration)* (1985), 63 N.R. 310 (Fed. C.A.).

This appeal arose from the refusal of a visa officer to approve the application of the appellant's father, Ajmer Singh Mundi, for the landing of himself, his wife, his son, Balwinder, and two daughters. The application had been sponsored by the appellant who

was at all material times a Canadian citizen. Ajmer Singh Mundi forwarded a false school leaving certificate for the purpose of establishing the date of birth of Balwinder Singh and to prove that Balwinder was under 21 years of age at the time of the application. The failure to satisfy the visa officer, with respect to Balwinder's age by means of this false school leaving certificate, did not affect the admissibility of Ajmer Singh, his wife and daughters because the false certificate, respecting Balwinder's age, was not relevant to the admissibility of the other family members. Section 9(3) was not a basis for refusing Ajmer Singh and the other family members because the false certificate was relevant only to Balwinder's admissibility as a dependant and had no bearing on whether the admission of the applicant and the rest of the family was contrary to the Act or Regulations. Further, section 79(1) did not allow the visa officer to refuse the application of the entire family simply because Balwinder was not a dependant and, therefore, not entitled to a visa. The application could only be refused in total if Ajmer Singh, who made the application, did not meet the requirements of the Act or Regulations.

*Owens v. Min. of Manpower & Immigration*, Fed. C.A., Doc. No. A-615-83, March 27, 1984.

The sponsoree filed an application for permanent residence on February 22, 1981. At that time the sponsoree was not free to marry the sponsor because his divorce was not final. The sponsoree signed the application on May 19, 1981 at which time he swore before an official of the Government of Canada that the contents of his application were true. On this date the sponsoree was free to marry.

The application was refused. The respondent had taken the view that the relevant date was February 22, 1981, the date of the filing of the application. The Immigration Appeal Board agreed with the respondent; however, the Federal Court of Appeal allowed the appeal and set aside the Board's decision because it decided that the relevant date was May 19, 1981, the date the sponsoree swore to the truth of the facts contained in the application.

*Grewal v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. No. V82-6005, January 18, 1984.

This was a sponsorship appeal from the refusal to accept the application for permanent residence of the father of the sponsor and his accompanying dependant. It was possible to establish the relationship of the father, the mother and one brother of the sponsor. It was not possible to establish the relationship of another young man and woman who were alleged to be a brother and a sister of this sponsor. A majority of the Board was of the opinion that entry should be denied only to those not proven eligible and that the father, the mother and brother whose relationship to the sponsor was established should be permitted to come to Canada. The minority would have disallowed the application of all parties because other alleged dependants were inadmissible under the regulations.

*Min. of Employment & Immigration v. Bechan*, Fed. C.A., Doc. No. A812-82, May 18, 1983.

Bechan sponsored an application for landing by a member of the family class. The application was refused on the basis that the applicant for landing was a person described in section 19(1)(h). The Federal Court of Appeal upheld the Immigration Appeal Board's



decision allowing the appeal on the basis that section 19(1)(h) referred only to immigrants at a point of entry. The applicant had made her application for landing at Port of Spain, Trinidad and, accordingly, the basis for the rejection of her application was invalid. Therefore, the Minister's appeal from the Immigration Appeal Board's decision was dismissed. The Court noted that the sponsor is entitled to be accurately informed of the grounds for the rejection of the application for permanent residence so that proper preparation of the appeal permitted by this Act could be effected.

*Bala v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T-81-9204, January 11, 1983.

The sponsor appealed the refusal of the Minister to approve the application for permanent residence of his parents, his brother and his sister. The basis of the refusal was the lack of proper or satisfactory evidence with respect to the age of the brother and sister. The Board received and accepted the evidence of a professor of radiology at the Faculty of Medicine at the University of Toronto when he gave evidence of the age of these 2 children and accepted and concluded that they were under the age of 21 years at the time the application for permanent residence was filed. Accordingly, the sponsor's appeal was allowed.

*Tse v. Min. of Employment & Immigration* (1983), 45 N.R. 252 (Fed. C.A.).

The Court made reference to the law of Hong Kong which legitimized the status of a concubine lawfully taken before October 7, 1971; the three children whom the appellant wished to sponsor were thus designated issue of a marriage for purposes of the Act and regulations. The Court first determined the domicile of the appellant, because legitimacy must be determined in accordance with the law of that province. The law of Ontario at the time of the sponsorship application had eliminated the concept of illegitimacy and made every child legitimate as of the date of its birth.

*O'Grady v. Whyte* (1982), 42 N.R. 608 (Fed. C.A.).

There is no duty on immigration officials to make a decision on a sponsorship application when an application for landing has not been made.

*Mauger v. Min. of Employment & Immigration* (1979), 109 D.L.R. (3d) 246 (Fed. T.D.).

The Court reaffirmed its view that a spouse had a right to withdraw a sponsorship application and disapproved of the proposition that public policy should forbid the withdrawal of sponsorship applications.

*Min. of Manpower & Immigration v. Tsiafakis*, [1977] 2 F.C. 216 (Fed. C.A.).

The right to sponsor is not a preliminary question. A person who seeks to sponsor someone for admission to Canada has a right to make an application in the prescribed form and to have his right to sponsor determined on the basis of that application. Accordingly, an immigration officer has a duty to supply the prescribed form to an applicant and, on his failure to do so, *mandamus* will issue.

**Subsection (3)**

*Canada (Min. of Employment & Immigration) v. Hundal* (1994), 167 N.R. 75 (Fed. C.A.).

This appeal by the Minister from a decision of the Appeal Division did not succeed. The Appeal Division had to decide whether the respondent had validly adopted Simrit Kaur Hundal in a 1983 adoption ceremony which had been conducted in India pursuant to section 11(vi) of the Hindu Adoption and Maintenance Act, 1956.

A visa officer in 1984 had no objection to the validity of the adoption. However, unusual circumstances prevented the mother and daughter from being united and when the matter was reconsidered by a visa officer in 1988 he came to a different conclusion.

The Court disagreed with the opinion of the Appeal Division that the first officer's decision in 1983 precluded a different decision by an officer in 1988. The officer in 1988 was entitled to view the matter in light of the facts as they appeared to him at that time. Notwithstanding this error by the Board, the appeal of the Minister was dismissed.

*Rattan v. Canada (Min. of Employment & Immigration)* (1994), 73 F.T.R. 195.

The applicant sought an order quashing a decision dismissing an appeal pursuant to section 77(3). An immigration officer had refused to approve the sponsored application of the applicant's husband on the basis that the marriage was one of convenience.

An appeal under section 77 is not a judicial review where only the correctness of the immigration officer's decision, on the basis of the material before him or her, is under consideration. The Appeal Division's role is to determine if the sponsoree is in fact a member of the class of persons excluded by section 4(3) of the Regulations. The Appeal Division's role is not merely to determine whether the immigration officer's decision was correctly taken. For the purpose of determining the issue before it, the sponsor's evidence and the immigration officer's decision must be reviewed by the Board in coming to its decision. If the sponsor can satisfy the panel that the immigration officer's conclusions were incorrect, the appeal is allowed.

There was evidence sufficient to support both the immigration officer's conclusions and the Appeal Division's decision that the husband lacked an intention to reside permanently with the applicant. Accordingly, the application was dismissed.

*Canada (Solicitor General) v. Kainth* (1993), 22 Imm. L.R. (2d) 114, 69 F.T.R. 148, affirmed, Fed. C.A., Doc. No. A-34-94, June 10, 1994.

The respondent was some years ago deported from Canada and pursuant to section 55 of the statute cannot be admitted without the Minister's consent. The Appeal Division purported to exercise its jurisdiction pursuant to section 77(3)(b) to grant the respondent, sponsored by his spouse, permanent residence in Canada. The issue was whether the Board's jurisdiction to grant relief under section 77 was sufficiently wide or unqualified to override the ministerial consent requirements in section 55. The Appeal Division was satisfied that there were sufficient humanitarian or compassionate grounds to forgive and forget the fact that the respondent had been deported some ten years ago. The application was dismissed.

Section 77(3)(b) deals with sponsored applications for landing of members of the family class. The statutory jurisdiction of the Appeal Division is defined in section 69.4(2) and includes questions of jurisdiction that may arise in relation to the refusal to approve

an application for landing made by a member of the family class. Section 77(1)(b) requires a visa officer to refuse the application if the member of the family class does not meet the requirements of the Act or the regulations. The Appeal Division's equitable jurisdiction can only be exercised when dealing with a refusal on the ground that the member of the family class does not meet the requirements of the Act or regulations. The exercise of the Division's equitable jurisdiction may include a waiver of any statutory or regulatory requirement in this type of situation. A Minister's consent under section 55 is only one of the several requirements which the Appeal Division may waive in this type of situation under its equitable jurisdiction. The Minister's consent is no more sacred than any other plain, unfettered or unqualified requirement of the Act. Accordingly, the application was dismissed.

*Grewal v. Canada (Min. of Employment & Immigration)* (1993), 62 F.T.R. 308.

The applicant arrived in Canada in July of 1990 and made a claim for refugee status. Prior to a determination of that claim he married a permanent resident, who sought to sponsor his application. The officer who interviewed both the applicant and his spouse concluded that the marriage was for immigration purposes and recommended that the application for landing be denied.

Where a statutory appeal lies judicial review will not proceed. The right of appeal conferred by section 77 belongs to the sponsor, in this instance the applicant's wife, and not the applicant. There is no authority which would allow a court to conclude that a right of appeal belonging to one individual operates as a bar to a right of judicial review belonging to another. The Court ruled, therefore, that it did have jurisdiction to hear the applicant's application for judicial review.

*Deol v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 1 (Fed. C.A.).

This appeal was directed against the decision of the Appeal Division of the Immigration and Refugee Board in which the Board dismissed an appeal from an immigration officer's refusal of an application for landing. The refusal was of a sponsored application of the appellant's widowed mother and her two dependent daughters on the ground that one of the daughters was suffering from mental retardation. There is now considerable authority as to the Board's role *vis-a-vis* the opinions of medical officers. It may not question the medical diagnosis, but when requested, it should enquire into the reasonableness of their conclusion as to the probable demands on government services. The Board did not enquire into the reasonableness of the medical officers' conclusion, but rather assumed from the sole fact of agreement as to the existence of mental retardation that the conclusion was reasonable. The mere invocation of mental retardation leads to no particular conclusion. Mental retardation is a condition covering a wide range of possibilities from the total inability to function to near normality. The concept cannot be used as a stereotype because it is far from a univocal notion. It is not the fact alone of mental retardation that is relevant, but the degree and the probable consequences of that degree of retardation for excessive demands on government services.

The Board had failed to make that assessment in this case and its decision was set aside. It was noted that the two medical officers had entered the sponsored dependent's intended occupation as "new worker". The tests of admissibility must be relevant to the purpose for which admission is sought. The medical officers may well have imposed



a higher standard of medical admissibility because they failed to realize that the daughter in question would enter as a sponsored dependent.

*Kaur v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 1 (Fed. C.A.).

Satnam Singh made an application for permanent residence which was sponsored by the appellant, a landed immigrant, who had married him in India. The application was refused and the sponsor's appeal was dismissed by the Immigration Appeal Board. Satnam Singh had been deported from Canada and the consent of the Minister required for his admission into the country had been refused. Requirement of the Minister's written consent set out in section 57(1) of the Immigration Act cannot be overcome and replaced by a favourable decision of the Immigration Appeal Board based on its so-called "equitable jurisdiction". The Court further noted that in the context of this case no evidence had been adduced which would have warranted the granting of equitable relief in any event. The Court distinguished the case of the *M.E.I. v. Narwal* (1990), 10 Imm. L.R. (2d) 183, on the basis that in that case the good faith of the spouses had never been in doubt.

*Kahlon v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-115-86, February 6, 1989.

This was an appeal by a sponsoring Canadian citizen from the dismissal by the Immigration Appeal Board of his appeal against a visa officer's refusal of the application for landing of his father, mother, brother and 2 sisters. Each applicant completed an individual application for landing. The Board found that the father and mother were not married and that none of the brothers and sisters had been proved to be children of the mother. This decision was given prior to May 1, 1985, when the definitions of son and daughter, in the *Immigration Regulations* were changed. Prior to May 1, 1985, the children of a sponsored parent had to be legitimate in order to be eligible for admission as dependants of that parent.

The Board's decision, however, was given on December 16, 1985. The decision on an appeal from this type of refusal, is a hearing *de novo* in a broad sense. The Court's duty was to consider, when it decided the appeal, whether the brothers and sisters were, in fact, eligible to be sponsored by the appellant as dependants of his father. The Board was obliged to apply the law as it stood when it made its decision. At that time, the dependants were eligible to be sponsored. Accordingly, the appeal was allowed, the decision of the Board set aside and the matter was remitted to the Board for reconsideration on a basis not inconsistent with the Federal Court's reasons.

*Brar v. Min. of Employment & Immigration* (1988), 5 Imm. L.R. 264 (Fed. C.A.).

The Immigration Appeal Board does not have jurisdiction to award costs in the absence of a specific statutory provision to that effect.

*Dubey v. Canada (Min. of Employment & Immigration)* (1987), 17 F.T.R. 319 (Fed. T.D.).

The Court was requested to quash a refusal, by the respondents, of an application for a visitor's visa on the grounds that the proposed visitor was required in Canada as a witness on behalf of the applicant at an Immigration Appeal Board hearing. The applicant at the hearing was attempting to prove that his marriage to the proposed visitor was *bona fide*. The sponsor in this case had, in fact, married another lady in February

1983 and divorced her in December 1984. In February 1985, less than 2 months after his divorce was final, the sponsor submitted the sponsorship in question. The sponsoree, when she was questioned about the sponsor, indicated that she knew nothing about him. She did not know his level of education, what he did for a living, and did not know the names of his family members. Further, the immigration officer, who refused the visitor's visa application, noted that in India where marriages are arranged the prospective partners are well briefed about each other and, thus, are very knowledgeable about the person with whom they have been paired. The officer was found to have been exercising his best judgment and was aware of all the facts when he opted to refuse the application. The Court was not satisfied that no other means existed whereby the evidence of the sponsoree could be reviewed. Further, the Court pointed out that the applicant was seeking an unusual benefit, namely, the admission to Canada of someone whose previous applications for admission to Canada had been refused. No denial of natural justice was found on the facts of this case. There was no evidence that the sponsoree was refused entry because she would testify on behalf of the applicant. The application was dismissed.

*Swinton v. Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 274 (Imm. App. Bd.).

Mr. Swinton sponsored the application for permanent residence of his father. His father's sworn affidavit indicated that while he intended to travel to Canada to be reunited with his son, he was not selling any of his property because he did not know how long he intended to live in Canada. The appeal from the refusal was allowed. The law does not require people to have an intention to abandon their homeland forever and never return to it, or to come to Canada never to leave it again. Further, in order to make out an intention to establish permanent residence in Canada, it is not necessary to forswear forever the formulation of a later intention to leave Canada to take up permanent residence, whether in an immigrant's native land or elsewhere.

*Stuart v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2591-86, April 16, 1987.

This application was made to obtain *certiorari* to quash the respondent's decision not to grant a visitor's visa to the applicant's spouse to enter Canada for the purpose of testifying as a witness at the applicant's appeal hearing before the Immigration Appeal Board. The applicant had sought to sponsor his spouse for entry as a member of the family class, but the respondent claimed that the marriage was entered into only for the purposes of gaining admission to Canada. It was determined that the applicant would be denied a fair hearing if he was prevented from calling his wife as a witness. Her son, who was 5 years old, was not granted permission to enter Canada. *Certiorari* was granted on condition that the applicant's spouse remain in custody for the purpose of ensuring her immediate return to Guyana after any attendance before the Immigration Appeal Board. The basis for admission was section 19(3) of the Act.

*Rajpaul v. Canada (Min. of Employment & Immigration)* (1987), 24 Admin. L.R. 153 (Fed. T.D.).

The applicant sought *certiorari* quashing the respondent's decision not to grant a visitor's visa to Sumintra Ramdas to enter Canada for the purpose of testifying as a witness. The applicant had applied to sponsor Ramdas, whom he alleged to be his wife.

The application was refused on the basis that the marriage had been entered into primarily for the purpose of gaining admission into Canada as a family class immigrant and not with the intention of residing permanently with the other spouse as contemplated by the Regulation. *Certiorari* was granted.

The outcome of the applicant's appeal to the Immigration Appeal Board, obviously, would depend upon the Board's assessment of the spouse's credibility on the issue of her primary purpose in entering into the marriage. The applicant had a substantive right to a fair hearing and could not be denied the opportunity to present this crucial evidence and testimony to the Board. It was a condition of the discretionary remedy that the spouse remain in detention pending the giving of evidence at the respondent's option. This latter condition was agreed to during the argument by counsel for the applicant.

The Court noted that in this case there was no previous conduct in Canada by the sponsoree that would justify the Court withholding *certiorari* by refusing to exercise its discretion.

*Canada (Min. of Employment & Immigration) v. Courtney*, [1987] 2 F.C. 22 (Fed. C.A.).

The respondent's mother came to Canada on August 22, 1982, as a visitor. Prior to the expiration of her mother's visitor's status, the respondent and her mother attended at a Canada Immigration Centre and requested consideration for the mother as an applicant for permanent residence from within Canada. This request was refused on the basis that insufficient humanitarian and compassionate grounds existed. The immigration officer, at the time of the interview, received the mother's completed application for landing and the undertaking of assistance given by the respondent. The Notice of Appeal from the refusal was filed with the Immigration Appeal Board. The Board allowed the appeal, concluding that a basis had been established to warrant the granting of relief on compassionate or humanitarian grounds pursuant to section 79(2)(b) of the Act. The Minister appealed successfully; until an exemption has been granted by the Governor in Council under section 115(2), no application for landing exists that "could be granted." Thus, the Immigration Appeal Board cannot acquire jurisdiction under section 79(2)(b).

*Kaushal v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 118 (Imm. App. Bd.).

This was an appeal from the refusal of a sponsored application for landing. The application was filed on November 5, 1980. It took over 4 years for the application to be processed. By the time the application was processed, one of the sponsoree's was over 23 years of age. Thus, the visa officer did not err in concluding that the sponsoree fell outside the definition of dependant as set out in section 2(1) of the Regulation. There could be estoppel in this case to prevent the Commission from asserting this proposition because the visa officer was charged with the statutory duty that he was obliged to fill. He was required to apply the Act and Regulation when carrying out an assessment required by section 9(2) of the Act. The administrative abuse reflected in the long delay in processing the application was not an abuse over which the Immigration Appeal Board had any jurisdiction. The Board held that section 79(2)(b) of the Act was irrelevant because the sponsoree was not a member of the family class, and, therefore no amount of humanitarian or compassionate consideration could avail the sponsor in the appeal.



*Bailon v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-783-85, June 16, 1986.

The appellant sponsored an application for landing by her mother and her half-brother, the latter being just under 21 years of age. Because of his age, the half-brother could only have been admitted as a dependant of his mother, who was a member of the family class. The application for landing by the appellant's mother, the only member of the family class to apply, was not refused. Section 79 of the Immigration Act gives a sponsor a right of appeal from the refusal of an application by a member of the family class, not from the refusal to include an alleged dependant of such member. The Board rightly declined jurisdiction to hear the appeal.

*Vadsaria v. Canada (Secretary of State for External Affairs)* (1986), 7 F.T.R. 299 (Fed. T.D.).

For digest, see section 77, subheading *Subsection (1), supra*.

*Mohamed v. Canada (Min. of Employment & Immigration)*, [1986] 3 F.C. 90 (Fed. C.A.).

This was an appeal from a decision of the Immigration Appeal Board dismissing an appeal from a refusal to approve a sponsored application for landing made by the appellant's father, mother, brother and sister. The ground for that refusal was that the appellant's mother was medically inadmissible. By the time of the appeal before the Immigration Appeal Board, the mother was no longer suffering from the medical condition that made her inadmissible. The first issue was whether her condition, at the time of the hearing of the appeal, was relevant. Mr. Justice Hugessen and Mr. Justice McQuaid concluded that the medical condition at the time the visa officer refused the application was relevant. The Chief Justice concluded that the relevant medical condition was that which the mother was in at the time of her appeal before the Immigration Appeal Board. The majority were of the view that the fact of the improvement in the mother's medical condition was relevant to whether special relief should be granted on the appeal pursuant to section 79(2)(b). The Court was unanimous, however, in quashing the Immigration Appeal Board's decision on other grounds.

*Lavi v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. T-83-9929, April 24, 1985.

The Minister contended that the conviction rendered against the husband of the appellant made the husband inadmissible by reason of section 19(2)(a)(i) of the Immigration Act. The refusal letter referred to the equivalent Canadian offences as being either section 233(1) or (4) of the Criminal Code. The Board asserted in its decision that the reference in the refusal to those subsections did not restrict the Board to make a determination of whether either of those 2 provisions was the correct equivalent Canadian offence. The Board asserted that in making its determination it may, if necessary, explore various other provisions of the Canadian law.

*Kalair v. Min. of Employment & Immigration* (1984), 10 Admin. L.R. 107 (Fed. C.A.).

The applicant signed an application to sponsor the landing in Canada of his adopted daughter. The application was refused because the daughter had not established that

she was the legally adopted daughter of the applicant. The Immigration Appeal Board dismissed the applicant's appeal. This decision was set aside because the Board based its decision upon evidence which had been adduced before in two earlier cases as to the existence and effect of certain aspects of the law of India bearing upon whether there had been a legal adoption in the eyes of that law. The Court held that the Board had deprived the applicant of the right to challenge the accuracy of that evidence and had, therefore, erred in relying upon it.

*Re Toor and Min. of Employment & Immigration* (1983), 144 D.L.R. (3d) 554 (Fed. C.A.).

A Canadian citizen applied to sponsor his wife and three children for admission. A visa officer refused to allow the wife and children to proceed to Canada and the sponsor appealed. The Immigration Appeal Board dismissed this appeal, holding that the wife did not meet the requirements of the Act and regulations because she had no intention of taking up residence in Canada when she filed her application for permanent residence. The Federal Court of Appeal set aside the finding as not being supportable on the evidence. Because the sponsor husband was a Canadian citizen, the wife's ineligibility had no bearing upon whether the children met the requirements of the Act or the Regulation.

*Tappin v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-9084-82, March 11, 1983.

This was a motion for a writ of *mandamus* ordering the respondents to accept Gladwin Tappin's application for permanent residence to determine whether it would be contrary to the Immigration Act and regulations to grant him landing, determine whether he required special permission to apply for landing from within Canada, to notify Gladwin Tappin whether his application had been accepted or rejected and to notify Arlene Tappin, in writing, whether her application to sponsor Gladwin Tappin as a member of the family class had been accepted or rejected. The applicant had already been advised that there were insufficient humanitarian grounds to make an exception to the Act and Regulation to warrant dealing with the application for permanent residence from within Canada. It was held that special permission to apply from within Canada had been denied. Once there was a proper refusal to deal with the application for landing made within Canada, there was no application for landing to be dealt with by the respondents and in its absence, the application to sponsor was a nullity. The decision refusing to accept an application for landing from within Canada need not, where sponsorship by a Canadian citizen is involved, be so framed as to permit a right of appeal to the Immigration Appeal Board under section 79(2) of the Act.

*Tsang v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T80-9437, April 1, 1981.

The appellant sponsored the application for permanent residence of her father. The father's application was refused on the grounds that he did not satisfy the medical requirements for immigrants and that his admission would cause excessive demands on health or social services. The appellant sought an order from the Immigration Appeal Board directing the Minister to produce the medical information upon which the decision was based. The Board found that the sponsoree, having signed a medical release in his

application for permanent residence, authorized the release of medical information by Health and Welfare Canada to the Minister of Employment and Immigration and, thus, found that the Minister was entitled to the medical information, which was in fact in the possession of Health and Welfare Canada. The Board concluded that it had jurisdiction to order production prior to the hearing of the appeal of the medical information sought by the appellant. The order for production was not made in this case because it was premature as no notice of the application for an order to produce had been given to the doctors from Health and Welfare Canada from whom production was sought.

#### *Subsection (4)*

*Darius v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 127 (Fed. C.A.).

On June 7, 1984, the Board allowed an appeal by the Minister against the decision of an adjudicator. On April 29, 1988 the Board varied its decision rendered on June 7, 1984 pursuant to a request by the respondent Darius that the June 7, 1984 decision was based on an error of law. The Minister appealed the Board's decision to vary its June 7, 1984 order. This appeal was allowed. The Board was held not to have the power to rescind its decisions when the decision was made in full compliance with all the requirements of natural justice. The mere fact that the decision was wrong in law did not give the Board the right to correct it and this was held to be so even though the effect of the decision was to deprive the respondent of the right to claim refugee status. The proper means to correct the error was an appeal of the Board's decision which had not taken place in this case.

#### *Subsection (5)*

*Mangat v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-153-85, February 25, 1985.

The applicant gave an undertaking of assistance to the application for permanent residence of certain of his relatives. The relatives were refused for medical reasons. The Immigration Appeal Board allowed the applicant's appeal because the medical reports, upon which rejection of the family application had been based, had expired. Subsequent to the successful appeal, a new decision was taken that again rejected the applications for permanent residence of the applicant's family. Counsel for the applicant contended that the Board's decision on the first appeal meant that the medical problem, identified in the expired certificates, could no longer be taken into account by the visa officer even if confirmed by new unexpired certificates. This argument was rejected. The Board was held to have taken no "decision" that the medical problem was to be ignored, but, rather, it was concluded that the Board had decided that the condition of rejection had not, as a matter of law, been properly proved, and, thus, consideration of new and proper medical evidence was not precluded. *Mandamus* was granted directing a visa officer to reconsider issuing a visitor's visa. The previous application for a visitor's visa had been rejected on the basis that the applicant had not satisfied relevant health requirements. The Court noted that the circumstances, relevant to medical opinions given under section 19(1)(a) of the Act, are different depending on the purpose and duration for which admission is sought. Here, the only medical opinions that the visa officer could have



had available were those prepared in relation to the family's application for admission for permanent residence. Thus, the visa officer's decision to refuse to issue a visa was quashed and *mandamus* was ordered against the respondents requiring that they direct a visa officer to reconsider the question of issuing a visitor's visa to the applicant's family.

**78. [Repealed 1992, c. 49, s. 69.]**

**Notice and Hearing**

**NOTICE OF APPEAL.**

79. A person who proposes to appeal to the Appeal Division shall give notice of the appeal in such manner and within such time as is prescribed by the rules of the Appeal Division. 1976-77, c. 52, s. 81; R.S.C. 1985 (4th Supp.), c. 28, s. 33.

**HEARINGS IN PUBLIC — Confidentiality — *Idem*.**

80. (1) Subject to subsections (2) and (3), an appeal to the Appeal Division shall be conducted in public.

(2) Where the Appeal Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of the appeal being conducted in public, the Appeal Division may, on application therefor, take such measures and make such order as it considers necessary to ensure the confidentiality of the appeal.

(3) Where the Appeal Division considers it appropriate to do so, the Appeal Division may take such measures and make such order as it considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (2). 1976-77, c. 52, s. 82; R.S.C. 1985 (4th Supp.), c. 28, s. 33; 1992, c. 49, s. 70.

**Adjudication Division**

**SOLE AND EXCLUSIVE JURISDICTION — Powers — *Sittings — Informal proceedings — Rules of evidence.***

80.1 (1) Subject to section 40.2, an adjudicator has sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in the course of proceedings that are required by this Act to be held before an adjudicator.

(2) An adjudicator has all the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and, without restricting the generality of the foregoing, may, for the purposes of any proceedings that are required by this Act to be held before an adjudicator,

(a) issue a summons to any person requiring the person to appear at the time and place set out in the summons to testify with respect to all matters within that person's knowledge relative to the subject-matter of the proceedings and to bring and produce any document, book or paper in the person's possession or under the person's control relative to the subject-matter of the proceedings;

(b) administer oaths and examine any person under oath;

(c) issue commissions or requests to take evidence in Canada; and

(d) do all other things necessary to provide for the full and proper conduct of the proceedings.

(3) Adjudicators shall sit at the times and at the places in Canada that are considered necessary by the Chairperson for the proper conduct of their business.

(4) An adjudicator shall deal with all proceedings as informally and expeditiously as the circumstances and considerations of fairness permit.

(5) An adjudicator is not bound by any legal or technical rules of evidence and, in any proceedings, may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case. 1992, c. 49, s. 70.

#### *Subsection (1)*

*Ashoornia v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1465, March 22, 1994.

This was an application for judicial review of a credible basis hearing. The applicant was a citizen of Iran. She was arrested and detained on her arrival in Canada. When arrested she was in possession of false documents. Prior to the credible basis hearing, the applicant attended at least two detention reviews. At the detention reviews the adjudicator continued the applicant's detention. He concluded that she should be detained because she had lied to enter Canada and had no friends or relatives in Canada and therefore no reason to remain here. The adjudicator's decision at the detention review was based in a large measure on the assessment of the applicant's credibility. The adjudicator, who had twice attended the detention reviews, also acted as the adjudicator at the credible basis hearing.

In the detention reviews the adjudicator had canvassed exactly the same evidence as he subsequently heard at the credible basis inquiry and had concluded that the applicant was not credible. In such a situation, a reasonable apprehension of bias was created by the adjudicator's presence at the credible basis hearing and the application for judicial review was allowed.

*Editor's Note:* Although the refugee determination provisions have been changed, the principle in this case may be of broader import.

*Khakh v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 548, 23 Imm. L.R. (2d) 38, 70 F.T.R. 26.

The applicant sought to overturn a decision of a credible basis panel holding a hearing under refugee provisions no longer in effect. The applicant alleged a reasonable apprehension of bias. The respondent argued that in failing to raise an objection on this basis before the credible basis panel, the applicant waived his rights to subsequently raise the issue. A reasonable apprehension of bias should be raised at the first opportunity. There is no waiver unless the party entitled to make the objection is fully aware of the nature of the disqualification and has adequate opportunity to make the objection. The Court will imply waiver where a party or its representative knows of the facts that give rise to an apprehension of bias and, notwithstanding, does not object. The party or its representative must be fully cognisant of the right to take objection. In this case, the adjudicator had, after the applicant requested an interpreter, refused the interpreter after testing the applicant in English. As the hearings progressed the adjudicator noticed that the applicant's English was deteriorating and this was taken to mean that the adjudicator had formed the view that the applicant was not doing his best in English. The failure of the unrepresented applicant to object to the adjudicator's jurisdiction on the basis of reasonable apprehension of bias, after this comment was made, was not taken to be a waiver of his rights to object before the Federal Court.

*Asante v. Canada (Min. of Employment & Immigration)* (1993), 64 F.T.R. 10.

The applicant was a citizen of Ghana. She came to Canada on October 12, 1989, having obtained a visitor's visa to Canada. Her visitor's visa was valid for one month and this visa was later extended to January 11, 1990. When the applicant could not go to the United States to study she claimed refugee status, but subsequently had her visitor's visa extended to July 11, 1990. On May 29, 1990 an immigration officer made a report pursuant to paragraph 27(2)(e) of the Immigration Act. A direction for inquiry was issued on July 4, 1990. At the conclusion of the inquiry the adjudicator issued a departure notice to the applicant. Later, a first-level panel concluded that there was no credible basis for the applicant's claim for Convention refugee status.

At the time the section 27 report was made and at the time the direction for inquiry was issued, the applicant was in Canada on a validly subsisting visitor's visa. There was no authority under the Act to make a report or to issue a direction for inquiry. Therefore, the adjudicator had no jurisdiction to proceed with the inquiry and issue a departure notice. Accordingly, the departure notice issued in this case was set aside.

*Boakye v. Canada (Min. of Employment & Immigration)* (1993), 151 N.R. 184 (Fed. C.A.).

During the course of the applicant's credible-basis hearing, discrepancies and contradictions appeared in her evidence. An attempt was made to claim that these discrepancies were based on faulty interpretation. The applicant's solicitor, who was fluent in the languages in issue, was called as a witness. He testified that the translation was competent and that he would have intervened had it been otherwise. Secondly, he testified that, in meeting with his client to review the transcript, she had not complained about the translation. The evidence of the solicitor as to the competence of the translation did not relate to anything that could be the subject of the solicitor/client privilege. It was evidence as to facts which he had observed in circumstances that were in no way



confidential. Accepting that what was said at the review of the evidence between the applicant and her solicitor was the subject of privilege, the applicant was represented by another lawyer when the privileged evidence was given. That lawyer did not assert any claim of privilege at the time the evidence was received and accordingly, the Court declined to quash the credible basis determination.

*Editor's Note:* Although decided under the old refugee determination system, the principles in this case may have a broader implication.

*Arthur v. Canada (Min. of Employment & Immigration)* (1992), 18 Imm. L.R. (2d) 22, 98 D.L.R. (4th) 254, 147 N.R. 288 (Fed. C.A.).

The applicant was a refugee claimant who had been detained prior to her credible-basis hearing under the legislation previously in effect. The same adjudicator who detained her was one of the two members of the credible-basis tribunal. The applicant's counsel objected to the adjudicator's participation because the adjudicator had made, at the bail hearing, a negative decision about the applicant's credibility. The mere fact of a second hearing before the same adjudicator, without more, does not give rise to a reasonable apprehension of bias. The presence of other factors indicating a predisposition by the adjudicator as to the issue to be decided may, however, give rise to such a reasonable apprehension. One consideration of major significance will be the relationship of the issues in the two hearings. A second consideration will be the finality of the second decision. If both decisions are interlocutory, it may be of little significance that the matter in issue is the same, but where the second decision is a final one, the similarity in issues may become more important. There was no predisposition by the adjudicator on the applicant's general credibility in this case and the application was dismissed.

*Armada Communications Ltd. v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 13, [1991] 3 F.C. 242, 127 N.R. 342, 83 D.L.R. (4th) 440 (C.A.).

An adjudicator presiding in an immigration inquiry has the practical capability to decide Charter issues. There is nothing in the Immigration Act to indicate any intention to preclude him or her from having and exercising the power to find a legislative provision inconsistent with the Charter. Accordingly, the Federal Court of Appeal under section 28 has jurisdiction to review those decisions.

*Editor's Note:* See, however, section 40.2

*Singh v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 126, 46 F.T.R. 184, [1992] 1 F.C. 332.

The applicant was the subject of an Immigration inquiry. At the outset of the hearing, counsel for the applicant indicated that she intended to raise a preliminary jurisdictional argument under section 52 of the Constitution Act. The adjudicator indicated that the tribunal would proceed with the Immigration inquiry and then deal with the constitutional issues. The applicant then commenced this proceeding. The action of the adjudicator in deciding to proceed this way is not subject to review under section 18 of the Federal Court Act. It is essentially a procedural decision and one entirely within the competence of the adjudicator. Second, the Court observed that constitutional issues cannot be decided in a factual vacuum. In doubtful cases, there is a practical advantage for an adjudicator

to be in a position to make a determination on the merits of the case at the same time that the constitutional validity of a provision is considered for the simple reason that a favourable adjudication on the merits may obviate the necessity of a long and protracted constitutional proceeding. The application for *certiorari* and *mandamus* was dismissed.

*Bissoondial v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 119, 47 F.T.R. 316.

The applicant had claimed to be a Convention refugee and a credible basis hearing was being conducted. The applicant raised substantive constitutional questions and wanted them dealt with prior to the evidence of the credible basis for the refugee claim being heard. The adjudicator decided that the tribunal would hear evidence on the inquiry, the credible basis hearing and the constitutional issues. Counsel for the applicant objected and wanted the constitutional issues decided prior to the credible basis hearing. The action of the adjudicator in making this decision is not subject to review. The decision is essentially procedural in nature and entirely within the competence of the adjudicator. The adjudicator and Refugee Board member conducting the credible basis hearing are not a court of competent jurisdiction; they cannot grant a general declaration declaring provisions of the Immigration Act unconstitutional. They can, however, respect the provisions of section 52(1) of the Constitution Act when considering and applying any enactment that is within their jurisdictional competence. The tribunal is limited in applying constitutional arguments to the facts of the particular matter before it within its statutory jurisdiction. Accordingly, the application for judicial review was dismissed.

*Akthar v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 39, 50 Admin. L.R. 153, [1991] 3 F.C. 32, 129 N.R. 71 (C.A.).

In this case, the applicant argued that the length of time between the original formulation of his refugee claim and the holding of the credible basis hearing was unreasonably lengthy and therefore offended section 7 of the Charter of Rights. The first stage tribunal did not hear the applicant's claim until just over 2½ years after his arrival. Any claim in a non-criminal case to Charter relief based on delay requires evidence or at the very least some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay. The delay in this case did not give rise to a Charter remedy and the application was dismissed.

*Editor's Note:* The refugee determination process has been changed, but the principle may still be applicable.

*Blanusa v. Canada (Min. of Employment & Immigration)* (1989), 27 F.T.R. 107 (T.D.).

The applicant argued that, because there were grounds under the Extradition Act and the Extradition Treaty with the United States upon which he might resist extradition under those instruments, proceedings under the Immigration Act to deport him ought to be prohibited. It was contended that to proceed with the deportation hearing would automatically violate section 7 of the Charter because the applicant would not be able to raise in the deportation proceedings objections to his removal which were, by their nature, only available in the extradition proceedings. Extradition and immigration proceedings are separate processes. The applicant was being proceeded against under the Immigration Act because he violated the laws of Canada by staying in this country

for over 2 years. He was being proceeded against under the Extradition Act and Treaty because he had allegedly committed kidnappings and murders in the United States. There was no basis for thinking that the deportation hearing was illegal or unconstitutional and accordingly the application was dismissed.

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

It is not a pre-condition to the operation of section 19(1)(c) that the Governor-in-Council shall have considered the question of rehabilitation and be dissatisfied that the person concerned has brought himself within the exception. The report mandated by section 27(1) requires the authorizing immigration officer to possess information that the person concerned has been convicted of the kind of criminal act specified in section 19(1)(c) and to have knowledge that the person concerned has not satisfied the Governor-in-Council as to his rehabilitation.

The policy directives, whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public. The procedural formalities which are required in respect to an immigration officer when initiating a section 27(1) report are minimal, first, because this is a purely administrative decision and, secondly, because the officer when issuing the section 27(1) report is merely the initiator of the inquiry process. An immigration officer before issuing a section 27(1) report is, therefore, not required to give the person concerned an opportunity to answer allegations contained in that report. On the facts, the immigration officer who issued the section 27(1) report had sufficient knowledge and information upon which to base the report; further, the applicant was given full particulars on the allegations against him.

The Court of Appeal adopted the motion's judge's findings that there was nothing irregular in the fact that the high profile nature of the case placed pressure on the respondent's representatives to proceed with dispatch.

The requirement of institutional independence is included in the rules of natural justice as well as enshrined in the Charter.

The test for institutional independence is whether a reasonable and right minded individual, having informed himself of the scheme whereby adjudicators are appointed under the Immigration Act and of the basis upon which they perform their duties, would be likely to conclude that an adjudicator appointed under and acting pursuant to that scheme, more likely than not, would decide fairly the inquiries under the Immigration Act over which he presided. While the case-presenting officers and adjudicators are both civil servants under the direction of the same Minister, they operate in separate and distinct divisions of the Commission. Case-presenting officers have no supervisory role, vis-à-vis adjudicators. They do not report to a common superior and it is only at the apex of the organization chart that their respective hierarchies merge. As far as legal direction is concerned, adjudicators can and do seek advice on difficult legal issues from lawyers on the staff of the Adjudication Directorate, who have no connection or association with the Enforcement Branch. On the subject of monitoring, there is evidence that monitoring practice focuses primarily on how hearings are conducted; with respect to security of tenure, adjudicators, like other civil servants, have the protection afforded pursuant to section 31 of the Public Service Employment Act. Additionally, they have the protection of a three stage grievance procedure. The fact that adjudicators are members of the



same bargaining unit as case-presenting officers is a neutral circumstance which does not give rise to any apprehension one way or the other. The practice of appointing adjudicators to other positions on an acting basis does not give rise to reasonable apprehension of a lack of independence. The Court relied on the uncontradicted evidence of an adjudicator to the effect that the decisions made by him were made independently and without direction from anyone else.

Finally, it was pointed out that the assignment of cases is rationally based; complex cases are usually assigned to the more experienced adjudicators. There was nothing to suggest that particular cases were assigned to particular adjudicators, let alone any evidence to suggest that the adjudicator chosen to conduct his inquiry was chosen on any basis other than the rational basis referred to previously. The Court concluded for these reasons that reasonable persons, reasonably informed, would view adjudicators appointed under the Immigration Act as being independent, keeping in mind the fact that they are for the most part laypersons in the hierarchy of quasi-judicial tribunals; and bearing in mind that their decisions are subject to judicial review by the Court; and that they have all taken an oath of office to "faithfully and honestly fulfill their duties" evolving upon them. Accordingly, the appellant's appeal was dismissed.

*Southam Inc. v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1588-87, July 17, 1987.

The adjudicators were prohibited from conducting detention review hearings in the absence of the applicants unless the applicants' right-of-access was outweighed or limited in any given case by counter-balancing rights or interests. Further, if any objections to the public's access were raised, the applicants were to be given an opportunity to present submissions on the point.

*Satiacum v. Min. of Employment & Immigration* (1985), 64 N.R. 358 (Fed. C.A.).

The circumstances that the adjudicator and the case presenting officer were both public servants employed in the same department of government, without more, was not such as to give rise to a reasonable apprehension of bias. An informed person viewing the matter realistically and practically would not conclude that it was more likely than not that the adjudicator would not decide fairly.

*Grewal v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-836-84, October 1, 1984.

An inquiry was held to determine whether the applicant was a person who had entered Canada as a visitor and remained in Canada after ceasing to be a visitor. The Court concluded that once a person has been made the subject of an inquiry to determine his right to stay in Canada, the mere fact that after the start of the inquiry he leaves the country for a time does not deprive the adjudicator of his jurisdiction to continue and complete the inquiry.

*Singh v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-258-84, September 21, 1984.

The section 20 report convoking the inquiry alleged that the applicant was described in section 19(1)(h) of the Immigration Act. In the course of the inquiry, the applicant testified that he intended to remain permanently in Canada. He was, therefore, a person described in section 19(2)(d) because of his failure to obtain an immigrant visa before

appearing at a port of entry contrary to section 9(1) of the Act. The exclusion order was based on sections 19(2)(d) and 9(1). The exclusion order was set aside because the subject of the inquiry must be advised of the allegations against him at the outset of the inquiry and if those allegations are changed, altered or substituted during the course of the inquiry, he must then be advised of the revised allegations and given an opportunity to meet them. This finding was supported by the provisions of sections 29 and 31 of the Regulations and the requirement of procedural fairness.

*Cambouras v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1870-83, April 11, 1984.

The applicant had been ordered deported at an earlier proceeding and entered Canada without a Minister's permit. At his inquiry, after the latter entry, he sought to establish that he was a permanent resident of Canada. The Federal Court approved the adjudicator's refusal to hear this evidence concluding that the applicant was in fact asking the adjudicator to revise the previous deportation order which was beyond the adjudicator's jurisdiction.

*Mavour v., Min. of Employment & Immigration*, [1984] 2 F.C. 122 (Fed. C.A.).

The applicant was arrested on March 15, 1983. An inquiry was caused to be held on March 22, 1983. On that day the inquiry was adjourned to March 30, 1983. The applicant was detained throughout this period, not only in respect of the immigration proceedings but also in respect of outstanding criminal charges. On March 30, 1983, the inquiry was not resumed because there was no case presenting officer available. The inquiry was resumed on April 6, 1983. The adjudicator did not lose jurisdiction by her failure to resume the inquiry on March 30, 1983, the date to which it had been adjourned. Further, the adjudicator's "offer" to release the applicant from detention that was to expire on April 12, 1983, at 4:00 p.m. was, in effect, a decision to release the applicant subject to the condition, among others, that the necessary security or cash deposit be made before a certain time. This was a condition which was within the authority of the adjudicator to impose under section 104(3) of the Act.

*Kaur v. Min. of Employment & Immigration* (1984), 58 N.R. 221 (Fed. C.A.).

The applicant sought admission to Canada as an immigrant. Following a report made pursuant to section 20(1) of the Immigration Act, she was made the subject of an inquiry. That inquiry adjourned after the applicant claimed to be a Convention refugee. During the adjournment the applicant left the country for the United States, was refused permission to enter that country and immediately came back to Canada where she reapplied to be admitted as an immigrant. The inquiry, which had been adjourned, culminated in an exclusion order. The adjudicator who presided over the inquiry did not lose jurisdiction when the applicant left Canada for the United States. Once a person seeking admission to Canada has been made the subject of an inquiry in order to determine her admissibility, the mere fact that she, after the start of the inquiry either left Canada or manifested an intention no longer to seek admission, does not deprive the adjudicator of his jurisdiction to continue the inquiry.

*Brenner v. Min. of Employment & Immigration*, [1983] 1 F.C. 172 (Fed. T.D.).

The adjudicator determined that the applicant was a person described in section 27(2)(a) because the applicant was inadmissible as a member of a class described in

section 19(2)(a)(ii). The applicant applied to the adjudicator for a grant of entry under section 19(3). The adjudicator decided that she had no jurisdiction to entertain the application. A writ of *mandamus* compelling the adjudicator to consider the application under section 19(3) was refused on the ground that her decision brought the person within section 32(6) and, therefore, the adjudicator had no discretion to grant entry to such a person under 19(3).

*Allen v. Min. of Employment & Immigration*, [1981] 1 F.C. 761 (Fed. C.A.).

It is sufficient for an adjudicator to state at the opening of an inquiry that he has been advised that an inquiry is to be held concerning the applicant. No written direction or particular document for the initiation of the inquiry is required.

*Grewal v. Min. of Employment & Immigration*, [1981] 1 F.C. 12, 112 D.L.R. (3d) 30, 37 N.R. 535 (Fed. C.A.).

An adjudicator cannot legally make an exclusion order against an applicant on the ground that he was a person described in section 19(1)(i) unless he determines that the person seeking to come to Canada is "at the time he makes his decision, a member of the inadmissible class" described in section 19(1)(i).

*Caccamo v. Min. of Manpower & Immigration*, [1978] 1 F.C. 366, 75 D.L.R. (3d) 720, 16 N.R. 405 (Fed. C.A.).

The statement of the Director of Information of the Department of Manpower and Immigration reported in a major newspaper as to the reason why the department had instituted deportation proceedings is not sufficient to give rise to a reasonable apprehension of bias in the inquiry which occurred as a result of that decision.

*Douglas v. Min. of Manpower & Immigration*, [1972] F.C. 1050 (Fed. C.A.).

Under the Immigration Act, R.S.C. 1970, it was held that where the Minister is proceeding in respect of a conviction for an offence that is under appeal, prohibition will not issue to stop the inquiry. The proper procedure is to put the accused before the officer conducting the inquiry and, if necessary, proceed by way of appeal from his decision.

### ***Subsection (2)***

*Goyal v. Canada (Min. of Employment & Immigration)* (1992), 9 C.R.R. (2d) 188 (Fed. C.A.).

In the context of the Immigration Act and Regulations, fairness required that the party bearing the onus of proof should have a right of reply and the failure to provide such an opportunity constituted reviewable error.

*Dee v. Canada (Min. of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 1, 135 N.R. 247, 83 D.L.R. (4th) 371 (Fed. C.A.).

The applicant sought to quash a deportation order on the ground that the adjudicator denied him natural justice when he refused to allow the applicant to call 2 Immigration officers as witnesses. There was no merit in this submission. The adjudicator's refusal to call these 2 officers was based on his opinion that the facts the applicant's counsel



intended to prove through these witnesses were irrelevant. The adjudicator was correct in so deciding and accordingly there was no denial of natural justice in his refusal to permit the applicant to call these 2 officers as witnesses.

*Reference re Immigration Act (sub nom. Immigration Act, Re)* (1991), 137 N.R. 64 (Fed. C.A.).

An application for directions under Rule 1501 will be dismissed unless the following conditions are fulfilled:

1. the issue referred to in the reference under section 28(4) of the Federal Court Act is one for which the solution can put an end to the dispute that is before the tribunal;
2. the issue is one that has been raised in the course of the action before the tribunal that makes the reference;
3. the issue results from facts that have been proved or admitted before the tribunal; and
4. the issue is referred to the court by order from the tribunal which order in addition to formulating the issue shall relate the observations of fact that give rise to the reference.

In this particular case the conditions were not met and reference purportedly made under section 28(4) of the Federal Court Act and Rule 1501 was vacated.

*Prasad v. Canada (Min. of Employment & Immigration)*, [1989] 1 S.C.R. 560, [1989] 3 W.W.R. 289, 36 Admin. L.R. 72, 7 Imm. L.R. (2d) 253, 93 N.R. 81, 57 D.L.R. (4th) 663.

The appellant had previously been deported from Canada. The appellant re-entered Canada without having obtained the written consent of the Minister and then became subject to a report. At the outset of the inquiry, the appellant applied to the Minister of Employment and Immigration for a Minister's Permit authorizing her to remain in Canada and to the Governor-in-Council for an exemption from the regulations pursuant to section 114(2). Counsel requested an adjournment of the inquiry to permit the appellant's application to be considered. The adjudicator refused, made a deportation order and that decision was the subject of a section 28 application which was dismissed by the Federal Court of Appeal. The Supreme Court of Canada dismissed this appeal holding that an adjudicator acting pursuant to section 27(3) is neither bound to accede to a request for an adjournment nor is bound to refuse it. The adjudicator had discretion in this type of case. The adjudicator must be cognizant that a "full and proper inquiry be held" and must ensure that statutory duty to hold an inquiry is fulfilled. The adjudicator might consider the number of adjournments already granted, the length of time for which the adjournment is sought and whether or not the purpose of the adjournment could have been affected prior to the commencement of the inquiry.

*Mohammad v. Canada (Min. of Employment & Immigration)*, [1989] 2 F.C. 363, 55 D.L.R. (4th) 321, 21 F.T.R. 240 (note) (Fed. C.A.).

The applicant sought to stay the proceedings of an inquiry pending his appeal to the Federal Court of Appeal of a judgment of the Trial Division dismissing his application for *certiorari* and prohibition. Assuming that the applicant had a serious case to argue on appeal, there was no irreparable injury in allowing the inquiry to start. If the applicant

was ultimately successful in the Court of Appeal, the final judgment of that Court would be quite capable of giving him adequate remedy. Holding the inquiry and pursuing it through all of its stages up to but not including the possible issuance of a removal order will not deprive the applicant of any legal right or have the practical effect of placing him in a position that the final judgment cannot cure.

*Noble v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1162-84, February 13, 1985.

The absence of a verbatim transcript of the inquiry did not invalidate the deportation order herein. A partial extract from the minutes of the inquiry was available. Furthermore, the adjudicator swore a Statutory Declaration confirming the accuracy of the partial transcript insofar as it reported his determination of the case. The existence of the partial transcript together with the adjudicator's Statutory Declaration operated so as to impose on the applicant an obligation to satisfy the Court, perhaps by way of affidavit evidence from the counsel at the inquiry that there were procedural irregularities sufficiently serious that entitled the Court to set aside the deportation order. No such material was filed on this application and, accordingly, the application was dismissed.

*Kosley v. Canada (Min. of Employment & Immigration)*, [1985] 1 F.C. 797 (Fed. C.A.).

There is no specific requirement in the Act or regulations that the proceedings at an inquiry be transcribed. As a matter of practice, they usually are.

*Kravets v. Min. of Employment & Immigration*, [1985] 1 F.C. 434 (Fed. T.D.).

This application raised issues dealing with the impact of section 15 of the Canadian Charter of Rights and Freedoms on section 19 of the Immigration Act. The applicant sought various orders for *mandamus* and *certiorari* concerning decisions or actions of the Minister and her officers and concerning an impending inquiry by an adjudicator. The respondent Minister sought an adjournment to prepare for the application. The adjournment was granted. The Court ruled that section 24(1) of the Charter empowered it to issue an order in the nature of prohibition preventing an adjudicator, in the future, from making a removal order or issuing a departure notice until the present application had been disposed of by the trial division. The Court noted that section 24(1) of the Charter applied to "anyone whose rights . . . have been infringed or denied." The Court decided that this language was broad enough to cover the present situation, which, at this stage in the proceedings, involved only an allegation of a past denial of Charter rights and an allegation of an apprehended denial of Charter rights in a future inquiry.

*Bowen v. Min. of Employment & Immigration*, [1984] 2 F.C. 507 (Fed. C.A.).

The applicant initially refused to testify at the inquiry on the advice of her counsel but later retreated from this position also on the advice of her counsel. The Commission, however, presented its case without the applicant's testimony. Section 11(c) of the Charter of Rights was held to be inapplicable to the applicant because it could not be said that the applicant was being compelled to be a witness at her inquiry when the counsel representing her conceded her compellability as a witness. It was further held that section 11(c) of the Charter had no application to the testimony to be given by the applicant because the applicant could not be said to be "a person charged with an offence". The Court observed section 24 of the Charter did not apply because it was a condition

precedent to the operation of that section that a person's rights or freedoms as guaranteed by the Charter be infringed or denied. The Court having decided that the applicant's rights or freedoms as guaranteed by the Charter had not been infringed or denied, was of the view that the conditions precedent to the operation of section 24 had not been met.

*Green v. Min. of Employment & Immigration*, [1984] 1 F.C. 441 (Fed. C.A.).

The *Jimenez-Perez* case does not require an adjudicator who receives an application under section 115(2) during the course of an inquiry to adjourn the inquiry immediately pending decision on that application by the Governor in Council. The adjudicator is required to proceed with the inquiry as expeditiously as possible in the circumstances of each case. The power of an adjudicator to adjourn is restricted to adjournments "for the purpose of ensuring a full and proper inquiry." The Court also noted that the decision in the *Tam* case was based on unusual facts.

*Schaaf v. Min. of Employment & Immigration*, [1984] 3 W.W.R. 1, 52 N.R. 54 (Fed. C.A.).

An admission of fact offered by counsel and confirmed by the subject of the inquiry is evidence upon which an adjudicator is entitled to act. Errors in law which could not and did not have any effect upon the outcome of the inquiry are not a basis for relief under section 28 of the Federal Court Act. The adjudicator erred in law when he did not, after deciding to hear testimony, give an opportunity to the subject of the inquiry or his counsel to present evidence and make submissions. This failure was caused by the conduct of the applicant and his counsel who indicated that the allegation in question was not contested. Accordingly, the errors could not have affected the ultimate decision at the inquiry and, therefore, the section 28 application was dismissed.

*Ioannidis v. Min. of Employment & Immigration*, [1983] 1 F.C. 369 (Fed. C.A.).

A deportation order was made on the ground that the applicant was a person described in section 27(2)(d) of the Immigration Act. The Court noted that it was wrong for the adjudicator to rule that in view of the applicant's refusal to answer the questions of the case presenting officer, the applicant would not be allowed to testify on his own behalf. This did not vitiate either the inquiry or the deportation order because counsel did not at any time during the inquiry seek to have his client testify and it could not be inferred from the record that the applicant would have testified had it not been for the ruling made by the adjudicator. Further, the Court could find nothing in the Canadian Charter of Rights preventing an adjudicator presiding over an inquiry under the Immigration Act from drawing legitimate inferences from the fact that the subject of the inquiry had refused to testify.

*R. v. Wooten* (1983), 9 C.C.C. (3d) 513 (B.C. S.C.).

This was an appeal by the Crown from an acquittal of the respondent of an offence under section 95(g) of the Immigration Act. The respondent was arrested and detained on the grounds that he was in Canada without the permission of the Minister and that he had falsely represented material fact to enable him to remain in the country. During the inquiry, the case presenting officer sought to call the respondent as a witness. The respondent's counsel objected. The adjudicator ruled against the respondent on this question. The respondent was sworn as a witness but refused to answer any questions.



The respondent was charged under section 95(g) and acquitted on the basis that section 95(g) was inoperative as it offended sections 7 and 11(c) of the Charter of Rights. The respondent was held not to be a person "charged with an offence" and, therefore, not subject to the protection of section 11(c) of the Charter. The Court adopted previous decisions which had characterized immigration inquiries as civil proceedings. Section 7 of the Charter was not applicable because the inquiry was a civil proceeding and there was, therefore, nothing fundamentally unjust in compelling the person who was the subject of the immigration inquiry to testify.

*Webb v. Min. of Manpower & Immigration*, [1982] 1 F.C. 687, 125 D.L.R. (3d) 510, 39 N.R. 495 (Fed. C.A.).

The Court left open the question of whether *R. v. Cole* was rightly decided. The Court did point out, however, that where the applicant does not refuse to testify, the principles enunciated in section 2(d) of the Bill of Rights do not avail.

*R. v. Forrester* (1982), 2 C.C.C. (3d) 467 (Ont. C.A.).

The appellant answered a number of questions at an inquiry before refusing to answer a question on the grounds that her answer might tend to incriminate her and declining an offer of the protection of the Canada Evidence Act, R.S.C. 1970, c. E-10. The Ontario Court of Appeal upheld her conviction under section 95 and adopted the reasons of the Federal Court in *Chana v. Min. of Manpower & Immigration*, [1977] 2 F.C. 496 (Fed. T.D.).

*Tam v. Min. of Employment & Immigration* (1982), 46 N.R. 1 (Fed. C.A.).

An inquiry was adjourned for the applicant to seek consideration from the Minister under section 115(2) [s. 114(2)] of the Act. On June 15, 1982, when the inquiry resumed, the applicant had received no final decision, although the Minister had undertaken to give one after consulting his local officials. The adjudicator refused a further adjournment and ordered the applicant deported. The deportation order was quashed because fairness required that the inquiry not proceed until the applicant had received the Minister's answer. The deportation order was also set aside, per Heald J., because the adjudicator erred in refusing to allow the applicant's counsel to make submissions with respect to the section 115(2) application.

*Re Anderson and Min. of Employment & Immigration*, [1981] 2 F.C. 30, 113 D.L.R. (3d) 243, 36 N.R. 423 (Fed. C.A.).

Where an adjudicator finds an applicant to be a member of an inadmissible class other than the inadmissible class specified in the section 27 report, and bases his departure notice on that finding, the departure notice will be set aside.

*Cheung v. Min. of Employment & Immigration* (1981), 36 N.R. 563 (Fed. C.A.).

An adjudicator's refusal to issue a summons permitting an alien to cross-examine the author of a statutory declaration containing admissions allegedly made by the alien is an error in law; the adjudicator's findings, based upon the untested statutory declarations, could not stand.

*Akpanson v. Min. of Employment & Immigration*, [1980] 1 F.C. 732 (Fed. T.D.).

An adjudicator has the power to compel an immigration officer to attend and testify where the immigration officer has changed the petition or student status to visitor status in circumstances where the reason for the change is not otherwise apparent. Where an adjudicator refuses to receive the evidence of such an immigration officer, an order to issue a writ of *mandamus* may be obtained.

*R. v. Cole*, [1980] 6 W.W.R. 552, 4 Man. R. (2d) 363, 17 C.R. (3d) 145, 54 C.C.C. (2d) 324, 115 D.L.R. (3d) 382 (Man. Co. Ct.), leave to appeal refused [1981] 1 W.W.R. 596 (Man. C.A.).

A person who fails to answer questions put to him at an immigration inquiry may not be prosecuted for an offence contrary to section 95(g) due to the protection in section 2(d) of the Canadian Bill of Rights with respect to the right of a person not to "incriminate" himself.

*Chana v. Min. of Manpower & Immigration*, [1977] 2 F.C. 496, 74 D.L.R. (3d) 491 (Fed. T.D.).

Under the old Act, an alien was held to be compellable to give evidence at a special inquiry. The Court was of the view that the alien's rights under section 2(d) of the Canadian Bill of Rights were not violated due to the fact that the alien was allowed to have counsel and was fully safeguarded against incriminating himself by virtue of the protections contained in the Canada Evidence Act, R.S.C. 1970, c. E-10.

*Ramjit v. Min. of Manpower & Immigration*, [1976] 1 F.C. 184 (Fed. C.A.).

Where the record of the proceedings does not contain the direction, and where nothing in the record of the proceedings shows that the person who issued the direction that was read at the inquiry was the Deputy Minister, or a person acting for the Deputy Minister, the deportation order will be set aside.

*Min. of Manpower & Immigration v. Brooks*, [1974] S.C.R. 850, 36 D.L.R. (3d) 522 (S.C.C.).

Duplicity in a direction for inquiry is not a ground for annulling the deportation order made at such inquiry. All that is required is that the subject of the inquiry be made aware of the allegations made against him under the relevant provisions of the Immigration Act and that he is given an opportunity to meet them.

*Re Vergakis*, [1965] 1 C.C.C. 343 (B.C. S.C.).

Under the Immigration Act, R.S.C. 1952, a witness was held to have the right to object to self-incriminating questions and to claim the protection of section 5 of the Canada Evidence Act, R.S.C. 1970, c. E-10, in respect of those questions. The Court ruled that the alien who was the subject of the proceedings was required to answer truthfully all questions put to him by the inquiry officer.

**Subsection (5)**

*Cambouras v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-1870-83, April 11, 1984.

For digest, see section 80.1, subheading *Subsection (1)*, *supra*.

*Ioannidis v. Min. of Employment & Immigration*, [1983] 1 F.C. 369 (Fed. C.A.).

For digest, see section 80.1, subheading *Subsection (2)*, *supra*.

*Cheung v. Min. of Employment & Immigration* (1981), 36 N.R. 563 (Fed. C.A.).

The applicant's right to cross-examine any witness presented by the case presenting officer cannot lightly be interfered with by an adjudicator. Only when there are proper grounds can an adjudicator refuse to allow the person concerned to present evidence and cross-examine. Where the right to cross-examine is interfered with improperly, a deportation order will be set aside.

*Jolly v. Min. of Manpower & Immigration*, [1975] F.C. 216, 54 D.L.R. (3d) 277, 7 N.R. 271 (Fed. C.A.).

The requirement that evidence be credible and trustworthy is met if the evidence is admitted but accorded little or no weight because the contents of the documents were not proved in accordance with the rules of evidence in a civil action. It would be wrong, however, in law for the document to be rejected because it had not been proven in accordance with the rules of evidence in a civil action, as this standard is not imported in the statutory rules of evidence in immigration matters.

## Security

**DEFINITION OF "REVIEW COMMITTEE"** — *Report to Review Committee* — *Notice to appellant* — *Application of the Canadian Security Intelligence Service Act* — *Statement to be sent to person affected* — *Effect of report* — *Report to Governor in Council* — *Report to appellant*.

**81. (1)** In this section and section 82, "Review Committee" has the meaning assigned to that expression by the *Canadian Security Intelligence Service Act*.

**(2)** Where the Minister and the Solicitor General are of the opinion, based on security or criminal intelligence reports received and considered by them, that a person who has made or is deemed by subsection 73(3) to have made an appeal pursuant to paragraph 70(1)(b) or 70(2)(d), or a member of the family class whose application for landing is the subject of an appeal under subsection 77(3) made by a person who has sponsored the application for landing is a person described

(a) in the case of a permanent resident, in paragraph 19(1)(c.2), subparagraph 19(1)(d)(ii), paragraph 19(1)(e), (f), (g), (k) or (l) or 27(1)(a.1), subparagraph 27(1)(a.3)(ii) or paragraph 27(1)(g) or (h), or



(b) in any other case, in paragraph 19(1)(c.2), (d), (e), (f), (g), (j), (k) or (l),

they may make a report to the Review Committee.

(3) Within ten days after a report referred to in subsection (2) is made, the Minister and the Solicitor General of Canada shall cause a notice to be sent informing the person who made the appeal of the report and stating that following an investigation in relation thereto, the appeal may be dismissed.

(4) Where a report is made to the Review Committee pursuant to subsection (2), the Review Committee shall investigate the grounds on which it is based and for that purpose subsections 39(2) and (3) and sections 43, 44 and 48 to 51 of the *Canadian Security Intelligence Service Act* apply, with such modifications as the circumstances require, to the investigation as if the investigation were conducted in relation to a complaint made pursuant to section 42 of that Act, except that

(a) a reference in any of those provisions to “deputy head” shall be read as a reference to the Minister and the Solicitor General of Canada; and

(b) paragraph 50(a) of that Act does not apply with respect to the person concerning whom the report is made.

(5) The Review Committee shall, as soon as practicable after a report is made to it pursuant to subsection (2), send to the person who made the appeal referred to in that subsection a statement summarizing such information available to it as will enable the person to be as fully informed as possible of the circumstances giving rise to the report.

(6) Notwithstanding anything in this Act, where a report concerning any person is made to the Review Committee pursuant to subsection (2), the hearing of an appeal concerning the person made or deemed by subsection 73(3) to have been made pursuant to paragraph 70(1)(b) or 70(2)(d) or made pursuant to section 77 shall not be commenced or, if commenced, shall be adjourned until the Review Committee has, pursuant to subsection (7), made a report to the Governor in Council with respect to that person and the Governor in Council has made a decision in relation thereto.

(7) The Review Committee shall, on completion of an investigation in relation to a report made to it pursuant to subsection (2), make a report to the Governor in Council containing its conclusion whether or not a certificate should be issued under subsection 82(1) and the grounds on which that conclusion is based.

(8) The Review Committee shall, at the same time as or after a report is made pursuant to subsection (7), provide the person who made the appeal referred to in subsection (2) with a report containing the conclusion referred to in subsection (7). 1984, c. 21, s. 84; R.S.C. 1985 (3d Supp.), c. 30, s. 9; 1992, c. 49, s. 71.

**SECURITY CERTIFICATES — Effect of certificate — Evidence.**

82. (1) Where, after considering a report made by the Review Committee referred to in subsection 81(7), the Governor in Council is satisfied that the person with respect to whom a report is made is a person referred to in paragraph 81(2)(a) or (b) as the case may be, the Governor in Council may direct the Minister to issue a certificate to that effect.

(2) Notwithstanding anything in this Act, the Appeal Division shall dismiss any appeal made or deemed by subsection 73(3) to have been made pursuant to paragraph 70(1)(b) or 70(2)(d) or made pursuant to section 77 if a certificate referred to in subsection (1), signed by the Minister, is filed with the Appeal Division.

(3) A certificate issued under subsection (1) is, in any prosecution or other proceeding under or arising out of this Act, conclusive proof of the matters stated therein and shall be received by the Appeal Division without proof of the signature or official character of the person appearing to have signed the certificate unless called into question by the Minister. 1976-77, c. 52, s. 83; 1984, c. 21, s. 84; R.S.C. 1985 (3d Supp.), c. 30, s. 11; R.S.C. 1985 (4th Supp.), c. 28, s. 33.

**Subsection (3)**

*Chiarelli v. Canada (Min. of Employment & Immigration)*, [1992] 1 S.C.R. 711, 16 Imm. L.R. (2d) 1.

This appeal calls into question the constitutionality of the statutory scheme pursuant to which a permanent resident can be deported from Canada if he is found to have been convicted of an offence for which a term of imprisonment of 5 years or more may be imposed. A further attack was brought against the interaction of that scheme with the investigations conducted by the Security Intelligence Review Committee (SIRC) into the activities of persons reasonably believed to be involved in certain types of criminal or subversive activity.

The respondent was convicted of a number of criminal offences and in January 1986 a report was written pursuant to section 27 of the Immigration Act identifying the respondent as a permanent resident described in 27(1)(d)(ii). As a result of this report an inquiry was directed pursuant to section 27(3). A deportation order was made against the respondent pursuant to section 32(2). The respondent appealed to the Immigration Appeal Board. That appeal was adjourned after the Solicitor General and the Minister of Employment and Immigration made a joint report to the SIRC. The report indicated that in the opinion of the Ministers the respondent was a person described in section 19(1)(d)(ii). The SIRC conducted the required investigation and reported to the Governor in Council pursuant to section 81(7). The Governor in Council adopted the conclusion of the SIRC and directed the appellant Minister to issue a certificate under section 82(1) with respect to the respondent's appeal. This certificate was issued, with the result that the respondent could not assert compassionate grounds as a reason for allowing the appeal.

The SIRC conducted its investigation and hearing first by reading a document entitled

“Statement of Circumstances” as well as two summaries of information. The first day’s hearing was held *in camera* and the respondent was excluded from the hearing and provided only with a summary of the evidence. The respondent was permitted to attend the second day of the hearing. The respondent declined, objected to the fairness and constitutionality of the proceeding before the SIRC, submitted no evidence at the hearing, and chose not to cross-examine two RCMP witnesses who had testified on the first day. Counsel did make submissions to the SIRC.

Section 27(1) requires an immigration officer in possession of information that a permanent resident falls into one of its enumerated classes to forward a report to the Deputy Minister. An inquiry is then held by an adjudicator in cases where the Deputy Minister considers one is warranted. Section 32(2) provides that where an adjudicator decides that a person who is the subject of an inquiry does fall within one of the classes in section 27(1), the adjudicator shall, except in the case of a Convention refugee, make a deportation order. All persons who fall within section 27(1)(d)(ii) have deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of the deliberate violation of the condition imposed by section 27(1)(d)(ii) is sufficient to justify a deportation order. Accordingly, sections 27(1)(d)(ii) and 32(2) are not contrary to section 7 of the Charter of Rights.

The deportation authorized by sections 27(1)(d)(ii) and 32(2) is not cruel and unusual punishment as described in section 12 of the Charter of Rights.

Section 6 of the Charter specifically provides for differential treatment of citizens and permanent residents. Accordingly, sections 27(1)(d)(ii) and 32(2) do not violate section 15 of the Charter. Permanent residents are given mobility rights in section 6(2). Only citizens are accorded the right to enter, remain in and leave Canada in section 6(1). There is no discrimination contrary to section 15 in a deportation scheme that applies to permanent residents but not citizens.

The effect of the security certificate in this case is to direct the Immigration Appeal Board to dismiss any appeal based on the existence of compassionate or humanitarian considerations. The permanent resident’s right of appeal after a certificate has been issued is restricted to questions of law, fact or mixed law and fact.

The Immigration Act, S.C. 1910, c. 27, did not provide any specific grounds of appeal. A person ordered deported could only resort to the Minister, who had authority to overturn a deportation order on unspecified grounds. The Immigration Act, R.S.C. 1952, c. 325, provided for an immigration appeal board; however, appeals against deportation orders remained under the control of the Minister. The Board heard only those appeals directed to it by the Minister, and the Minister retained the power to confirm or quash the Appeal Board’s decision or substitute his decision as he deemed just and proper. The 1966 *White Paper on Immigration* recommended that a reconstituted Immigration Appeal Board have authority to deal conclusively with appeals against deportation orders except in security cases. The Immigration Appeal Board Act, 1967 for the first time conferred upon the Board the power to stay or quash a deportation order made against a permanent resident on the basis of all the circumstances of the case. This new power was subject to the discretion of the Minister and the Solicitor General, who could certify their opinion based on security or criminal intelligence reports that it would be contrary to the national interest



to permit such relief. This reserves to the Crown the right similar to the prerogative right which existed at common law, to determine that the continued presence in Canada of an alien, subject to a deportation order, was not conducive to the public good. The Immigration Appeal Board Act was repealed by the Immigration Act, 1976. However, this new Act did not change the nature of the decision that could be made by the Board having regard to all the circumstances of the case. That decision remained as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds. Section 83 of the Immigration Act, 1976 limited the availability of relief based on all the circumstances of the case. Such an appeal had to be dismissed if the Minister and Solicitor General certified their opinion that it would be contrary to the national interest to permit such an appeal. In 1984 the SIRC was established by the Canadian Security Intelligence Service Act, S.C. 1984, c. 21. The Review Committee was assigned various functions under several Acts, including the Immigration Act, 1976. Sections 83 and 82.1 of the Immigration Act, 1976 were repealed and amended versions were substituted. The decision to direct the issuance of a security certificate, however, remained with the Governor in Council. Thus, there has never been a universally available right of appeal from a deportation order on humanitarian or compassionate grounds or "having regard to all the circumstances of the case." Such an appeal has historically been a purely discretionary matter. The right of appeal required to comply with the principles of fundamental justice is a true appeal which enables the decision of first instance to be questioned on factual and legal grounds. The absence of an appeal on wider grounds does not violate section 7.

The procedure followed by the Security Intelligence Review Committee in this case recognized competing individual and state interests and attempted to find a reasonable balance between them. It was not necessary that the respondent be given details of the criminal intelligence investigation techniques or police sources used to acquire the information upon which the two Ministers relied in issuing the certificate. The respondent was given an opportunity to respond by calling his own witnesses or by requesting that he be allowed to cross-examine the RCMP officers who testified *in camera*. Such a procedure was sufficient to meet the requirements of the principles of fundamental justice.

### **Applications and Appeals to the Federal Court**

***JUDICIAL REVIEW BY FEDERAL COURT — Exception — Application for leave — Consideration of application for leave — Extension — Day and place of review — Fixing day for review — Review in summary way — Right of Minister — Information obtained in confidence.***

**82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.**

(2) Subsection (1) does not apply with respect to a decision of a visa officer on an application under section 9, 10, or 77 or to any other matter arising thereunder with respect to an application to a visa officer.

(3) An application under this section for leave to commence an application for judicial review shall be filed with the Federal Court — Trial Division and served within fifteen days after the day on which the applicant is notified of the decision or order or becomes aware of the other matter.

(4) Unless a judge of the Federal Court — Trial Division directs otherwise, an application under this section for leave to commence an application for judicial review shall be disposed of without personal appearance.

(5) A judge of the Federal Court — Trial Division may, for special reasons, allow an extended time for filing and serving an application under this section for leave to commence an application for judicial review.

(6) Subject to subsection (7), where leave to commence an application for judicial review is granted, the application for judicial review shall be deemed to have been commenced and the judge granting leave shall fix the day and place for the hearing of the application for judicial review.

(7) In fixing a day pursuant to subsection (6), the judge shall set the matter down for a day that is no sooner than thirty days, and no later than ninety days, after the day on which leave to commence the application for judicial review was granted, unless the parties agree that the matter may be set down on an earlier day.

(8) Any application for leave to commence an application for judicial review, and any application for judicial review, under this section shall be determined without delay and in a summary way.

(9) The Minister may, in accordance with subsection (1), make an application for leave to commence an application for judicial review with respect to any decision of the Refugee Division whether or not the Minister presented evidence, questioned witnesses, made representations or otherwise took part in the proceedings before the Refugee Division.

(10) With respect to any application for judicial review of a decision by a visa officer to refuse to issue a visa to a person on the grounds that the person is a person described in any of paragraphs 19(1)(c.1) to (g), (k) and (l),

(a) the Minister may make an application to the Federal Court — Trial Division, *in camera*, and in the absence of the person and any counsel representing the person, for the non-disclosure to the person of information obtained in confidence from the government or an institution of a foreign state or from an international organization of states or an institution thereof;

(b) the Court shall, *in camera*, and in the absence of the person and any counsel representing the person,

(i) examine the information, and

(ii) provide counsel representing the Minister with a reasonable oppor-

tunity to be heard as to whether the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(c) the information shall be returned to counsel representing the Minister and shall not be considered by the Court in making its determination on the judicial review if, in the opinion of the Court, the disclosure of the information to the person would not be injurious to national security or to the safety of persons; and

(d) if the Court determines that the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national security or to the safety of persons, the information shall not be disclosed but may be considered by the Court in making its determination. R.S.C. 1985 (4th Supp.), c. 28, s. 19; 1990, c. 8, s. 53; 1992, c. 49, s. 73.

*Singh v. Canada (Min. of Employment & Immigration)* (1993), 69 F.T.R. 142.

The applicants sought to set aside a decision that they were not Convention refugees. This case discusses how findings on the evidence can be successfully challenged in the Trial Division.

The Court commented that section 18.1(4)(d) of the Federal Court Act set out disjunctive conditions under which a decision will be set aside. For purposes of paragraph (c) of that section, the Court noted that findings of fact which are unsupported by adequate evidence are errors in law — the so-called “no evidence rule”. Section 18.1(4)(d) allows the Court to set aside a decision which is made “without regard for the material before it”. This grants a broader right of review than the traditional “no evidence” test. It compels the setting aside of tribunal decisions where they are unreasonable. The phrase “perverse or capricious manner or without regard for the material before it” is accurately discussed in J.A. Kavanagh, *A Guide to Judicial Review* (1978) at 57-58.

The findings of fact can be divided into two classifications: findings of primary facts and inferences of fact which are drawn from the primary facts. Courts are reluctant to interfere with findings of primary facts made by tribunals. In areas where a tribunal has a particular expertise in drawing inferences, courts are inclined to treat those inferences with deference. If, however, the inference is of a type which is based on common experience, then the court is in equally as good a position as the tribunal to draw the inference and in that case deference is not shown.

In this particular case, the inferences of fact drawn by the Board did not stand up upon a review of the evidence and the decision refusing refugee status was set aside.

*Garcia v. Canada (Min. of Employment & Immigration)* (1993), 65 F.T.R. 177.

The applicant sought to stay an order removing him from Canada pending the disposition of an application for leave and for judicial review of a decision of an immigration officer denying him an exemption, on humanitarian and compassionate grounds, from the visa requirements of section 9(1) of the Immigration Act as provided under section 114(2) of the Act.

This case is an example of one where the Court found irreparable harm would result from removal from Canada due to the precarious state of the applicant's mind.



The applicant had submitted psychiatric evidence of his fragile psychological condition for which he had been under treatment in Canada for a number of years since his arrival. This fragile condition extended to serious suicidal intentions if faced with deportation to his country of origin. The Court noted that the only inconvenience to the respondent in this matter on the question of where the balance of convenience lay was the minimal delay in removing the applicant from Canada, should his application for leave not be granted.

*Hernandez v. Canada (Min. of Employment & Immigration)* (1993), 154 N.R. 231 (Fed. C.A.).

The “unreasonable delay” argument should not be perceived by counsel as a fertile basis for setting aside decisions in refugee hearings. It is closer to legal reality for one to presuppose that rarely, if ever, will the argument be successfully invoked.

*Edumadze v. Canada (Min. of Employment & Immigration)* (1993), 59 F.T.R. 269 (Fed. T.D.).

This is an example of a case where an adjudicator’s decision to proceed in the absence of counsel was not quashed. The Court noted that if every refugee claimant was entitled to judicial review because of the non-availability of counsel, the system would be in chaos. In this case five adjournments were granted, two of which were preemptory, before the decision was made to proceed in the absence of counsel.

*Rubilar v. (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-487, August 17, 1992.

The applicant sought an extension of time within which to file affidavits in support of an application for leave to commence proceedings for judicial review. The applicant requested a 30-day extension within which to file affidavits due to the fact that the applicant’s counsel was having difficulty in contacting the applicant prior to the time for filing. This request for an extension of time was not forwarded to the Court by registry staff. Accordingly, no decision was made before the time for filing had passed. The respondent argued that the applicant’s leave application should be dismissed due to an absence of supporting material or in the absence of an order extending the time. Where there is a possibility that an applicant will be prejudiced as a result of internal Court procedures, an extension of time will be granted. Accordingly, the applicant was directed to file supporting affidavit material within five days of the Court’s order extending the time and the respondent Minister was given 30 days after the date of filing to respond to the application for leave.

*Membreno-Garcia v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 306, 7 Admin. L.R. (2d) 38, 17 Imm. L.R. (2d) 291, 93 D.L.R. (4th) 620, 55 F.T.R. 104 (C.A.).

The applicant had applied for refugee status but a first-level tribunal found that there was no credible basis to the applicant’s claim. The applicant applied for leave to commence an application for judicial review, which leave was granted. The applicant then sought a stay of the deportation order pending the outcome of the appeal.

In the present case, the deportation order flowed from and was underpinned by the decision finding no credible basis to the applicant’s claim. If that decision was invalid

then the deportation order was invalid. In such circumstances, a challenge has in fact been made to the validity of the deportation order.

In *Lodge v. Canada (Min. of Employment & Immigration)*, [1979] 1 F.C. 775 (C.A.), the Court stated the principle to be applied in deciding whether a permanent injunction should be granted to restrain a Minister of the Crown from performing his statutory duty. In *Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123 (Fed. C.A.), the Court held that it had jurisdiction to grant a stay in cases such as this one. Since that time the Trial Division's jurisdiction has been made clear by the addition of section 18.2 of the Federal Court Act.

The only requirement under section 18.2 is that the judge consider the interim order "appropriate". It may be that in the absence of at least an indirect attack on the deportation order the court would not consider a stay appropriate.

In determining when a stay order is "appropriate" the Court referred to the criteria set out in *Toth*. Given that leave had been granted, the applicant clearly had an arguable case. On the basis of the applicant's affidavit evidence it would be hard to reach any other conclusion than that the applicant would suffer irreparable harm if he was returned to El Salvador. Insofar as the balance of convenience is concerned, the test set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, is not relevant. In that case, the validity of one section of the statute was under attack and thus an interlocutory injunction order in favour of one litigant impliedly would lead to similar orders respecting all individuals covered by the allegedly unconstitutional section in question. The section itself would in fact be rendered inoperative pending the determination of its validity. In the present case the legislative provisions of the statute were not challenged. One decision by an adjudicative body operating under the statute with respect to one specific individual was being challenged. Rendering an injunction or a stay order in such a case will not suspend the operation of any part of the legislation. Thus, the public interest considerations expressed in *Metropolitan Stores Ltd.* are not in issue.

When considering the balance of convenience in these types of cases the extent to which the granting of the stay might become a practice which thwarts the efficient operation of the immigration legislation is a valid consideration. The present procedures were put in place because a practice had grown up in which cases totally devoid of merit were initiated in court for the sole purpose of buying the applicants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which must be weighed against the potential harm to the applicant if a stay is not granted.

The situation here in this case is quite different from that which exists, for example, when applicants seek humanitarian and compassionate reviews on the eve of the execution of a deportation order and then argue that a stay should be granted because of the uncompleted nature of that review. Such a case is the type of situation in which there is a potential for creating a practice which undermines the orderly operation of the legislation.

Another significant factor in considering the balance of convenience test is the degree of delay which is incurred, if any, in prosecuting the applicant's appeal. Similarly, when the applicant knows of the decision which underlies the challenge to the deportation order and does not seek leave to commence a section 18 proceeding until the very last

moment, there is reason to assume that the seeking of leave and the subsequent request for the staying of the deportation order are primarily time-buying manoeuvres.

In the present case, the balance of convenience was said to lie with the applicant and the stay was granted.

*Editor's Note:* Although the refugee procedures have changed, the principle stated herein may still be useful.

*Khan v. Canada (Min. of Employment & Immigration)* (1992), 53 F.T.R. 158 (T.D.).

An earlier inquiry concerning the applicant's continuing presence in Canada was quashed by decision of the Court (*Khan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1282-89, July 28, 1989). The preliminary question was whether the application for a stay was properly before the Court in light of the decision in *Ontario Khalsa Darbar Inc. v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 179 (Fed. T.D.), which held that leave is required to bring an application for a stay in immigration proceedings pursuant to 82.1 of the Immigration Act. Previously, *Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123; 86 N.R. 302 (Fed. C.A.) acknowledged the inherent jurisdiction of the court to deal with an application for a stay in appropriate circumstances without the necessity of leave being applied for. Section 18.2 of the Federal Court Act, enforced since February 1, 1992, provided authority for the issuance of interim orders in relation to the matters before the Court and was sufficient to give jurisdiction to consider an application for a stay which in this case was interrelated with an application for leave to seek judicial review.

In this case there was no evidence of irreparable harm and the application for a stay was dismissed. The inquiry in question might result in a departure notice and, further, even if a deportation order were issued, removal would only occur after a pre-removal review. This review could result in a decision that there were humanitarian or compassionate considerations which justified permanent residence. Accordingly, the concerns of the applicant about the outcome of the inquiry were speculative and as such not evidence of irreparable harm.

*Hosein v. Canada (Min. of Employment & Immigration)* (1992), 4 Admin. L.R. (2d) 162, 17 Imm. L.R. (2d) 125, 53 F.T.R. 86 (T.D.).

This was an application for an order staying an inquiry until the applicant's application for leave to commence judicial review proceedings was determined, and if leave be granted until those proceedings were finally disposed of by the Court. This application was accompanied by an application for leave pursuant to 82.1. The orders in question were sought in respect of a decision by a first-level tribunal to the effect that it would not hear evidence and argument in relation to section 7 of the Charter. The tribunal then proceeded to find the applicant did not have a credible basis for his claim to being a Convention refugee. The tribunal adjourned and then scheduled a resumption of its hearing. The application for leave to seek judicial review was not considered when this application for a stay was heard.

The Court's jurisdiction to order a stay of proceedings was not limited by section 18.2 of the Federal Court Act by the necessity to apply for leave to seek judicial review. In an appropriate case, particularly one where the issue raised in an application for leave



is arguable but would be moot or the jurisdiction of the court would be rendered nugatory by failure to grant a stay, a stay may be ordered within the discretion of the court.

The Court was not persuaded that a stay of proceedings was required at the time the application was heard. Further steps in the process of consideration of the applicant's situation were required before he would be excluded from Canada. The leave for judicial review now sought by the application could proceed in the ordinary course. If the leave application was not completed before steps were taken to remove the applicant, the applicant could apply for leave to stay implementation of those procedures at that time. The test for intervention is set out in the *Toth* case (*Toth v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 123, 86 N.R. 302 (Fed. C.A.)).

It was determined that it was inappropriate at this stage to stay proceedings of the tribunal and the application was dismissed.

*Canada (Min. of Employment & Immigration) v. Conception*, Fed. C.A., Doc. No. A-1042-91, December 12, 1991.

An application governed by section 82.1 can only seek leave to commence a proceeding. It cannot also seek interlocutory relief which might be sought if leave were granted.

*Ontario Khalsa Darbar Inc. v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 179, 48 F.T.R. 109 (T.D.).

This case was begun as an action with a Statement of Claim. The plaintiffs requested a date for the hearing of an application for an interlocutory injunction on an urgent basis. The plaintiffs had not sought nor obtained leave to commence these proceedings. Leave is required for this application pursuant to section 82.1(1) of the Immigration Act. The Court declined to appoint a special date for the hearing of the application for the injunction. The application for the injunction was not dismissed but the Court ordered that no materials be filed in respect of the application for the injunction until leave was sought and obtained.

*Sayed v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 90-T-825, April 29, 1991.

Counsel applied to the Court to re-consider its pronouncement that leave to appeal be denied. This application was pursuant to rule 337 of the Federal Court Rules. This application was successful and the order denying leave was varied to allow the application to proceed.

*Aguiar v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 280 (Fed. T.D.).

Applications for leave to proceed are generally to be in writing. Leave to make representations orally is rarely given. The usual reason, when permission is given, is on grounds of urgency, however, urgency is not the only ground. In this case, the husband and wife were both interviewed by the same Immigration officer. A joint decision was rendered refusing their application for consideration on humanitarian and compassionate grounds. The husband applied for and obtained leave to commence proceedings. The wife's grounds in her application for leave are almost identical to the husband's. In these circumstances, leave was granted to argue the application orally.

*Mahabir v. Canada (Min. of Employment & Immigration)* (1991), 137 N.R. 377, [1992] 1 F.C. 133, 85 D.L.R. (4th) 110, 15 Imm. L.R. (2d) 303 (C.A.).

A member of the Convention Refugee Determination Division and an adjudicator determined that there was no credible or trustworthy evidence of the applicant's claim to Convention refugee status. The applicant then commenced a section 28 application without the leave required by section 82.1(1) of the Immigration Act. This application was quashed. Having chosen to seek a Charter remedy by a proceeding authorized by the Immigration Act rather than suing for a declaration of those rights, the applicant was bound by the condition precedent that he obtain leave to proceed. Section 24 of the Charter and section 52 of the Constitution Act do not of themselves give jurisdiction to a court. Section 24 gives a remedial power and section 52.1 gives a declaratory power to be exercised in disposing of matters properly before the Court. A decision or order, whether it concerns the Constitution or not, is made under the Immigration Act when it is made by a tribunal that derives its authority to make decisions or orders from the Act. Finally, the decision that the credible basis provisions of the Immigration Act were not rendered inoperative by the Charter was not a final decision. A constitutional question is not necessarily a substantive question before a given tribunal. The constitutional question here went to the right of the tribunal to conduct its proceedings and not to any substantive right of the applicant. All that the decision here finally decided was that the proceeding would continue. Since the decision of the tribunal as to the constitutional question was not a final decision, it was not reviewable under section 28 of the Federal Court Act.

*Gill v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 75, (*sub nom. Gill (H.K.) v. Canada (Min. of Employment & Immigration)*) 49 F.T.R. 291 (T.D.).

The applicant originally applied in 1980 to sponsor her parents together with her brother and sister for landing in Canada. This application was denied because there was difficulty in documenting the relationship. She reapplied in 1984 to sponsor just her parents. In April 1987, after she had initiated court action, visas were issued to her parents to allow them to enter Canada so that blood tests could be done. The tests were carried out and the parental relationship established. The applicant's parents have remained in Canada ever since; however, the slowness with which their application for permanent residence was being processed caused the applicant to commence these *mandamus* proceedings. The Court held that leave to commence the application was required. The application could not be characterized as one to a visa officer simply because information is being sought abroad or because an application by the applicant's brother for landed status is related to the parents' application. The Court noted that the brother's application was not part of the proceedings with respect to which *mandamus* was sought.

*Coliseum v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 24 (Fed. T.D.).

It is inappropriate, when considering whether or not to grant leave, to deal with the merits of the application, save to the extent necessary to deal with the application for leave. The requirement for leave to be granted was added to the Act to avoid a multiplicity of section 18 applications of a frivolous nature. Leave should not be granted lightly; on the other hand, if there is even a scintilla of evidence indicating that there

might be some serious issue to deal with at the hearing of the section 18 motion, leave should be granted.

*Bains v. Canada (Min. of Employment & Immigration)* (1990), 47 Admin. L.R. 317, 109 N.R. 239 (Fed. C.A.).

The only question to be considered in disposing of an application for leave under section 82.1(1) or 82.3(1) is whether or not a fairly arguable case is disclosed for the relief proposed to be sought if leave is granted. Further, the need for material not immediately available has to be established by the applicant and the mere stated intention to rely on such material does not, without an application and an order to that end, operate to extend the time provided by the Federal Court Immigration Rules for the applicant to file an affidavit and/or representations in support of the leave application. The requirement for leave is, in reality, the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that disclose no reasonably arguable case. The requirement for leave does not deny refugee claimants access to the court. The right to apply for leave is, itself, a right of access to the court and the requirement that leave be obtained before an appeal or application for judicial review may proceed does not impair the right guaranteed by refugee claimants under either sections 7 or 15 of the Charter.

*Saleh v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 89-T-667, September 22, 1989.

On application for leave, one should grant such a request unless it is plain and obvious that the applicant would have no reasonable chance of succeeding on the section 18 application. The Court applied the same test as set out in rule 419(a) of the Federal Court rules dealing with a motion to strike.

*Brar v. Canada (Solicitor General)* (1989), 30 F.T.R. 284 (Fed. T.D.).

The Court determined that section 82.1 applied to this action and that accordingly leave to bring the motion and initiate the action was required. The Court determined that the test for leave was whether the application raises a serious issue to be heard. Where no serious issue with no possibility of success in a hearing or in an action was found, leave was to be denied.

*Arulampalan v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 172, 30 F.T.R. 239 (Fed. T.D.).

The requirement under section 83.1 that an applicant for section 18 of the Federal Court Act relief obtain leave of the Court first does not violate section 15 of the Charter.

### ***NO APPEAL FROM DECISION OF FEDERAL COURT — TRIAL DIVISION ON APPLICATION FOR LEAVE.***

**82.2 No appeal lies to the Federal Court of Appeal from a judgment of the Federal Court — Trial Division on an application under section 82.1 for leave to commence an application for judicial review under the *Federal Court Act*, 1990, c. 8, s. 54; 1992, c. 49, s. 73.**



*Reza v. Canada* (1994), 18 O.R. (3d) 640 (S.C.C.).

This was an appeal from a decision of the Ontario Court of Appeal setting aside an order made by a motions judge staying the respondent's application for a declaration that certain provisions of the Immigration Act infringed the Charter of Rights. The issue on appeal was whether there was any basis for the Court of Appeal's interference with the motion judge.

The respondent came to Canada from Iran and claimed refugee status. It was found that there was no credible basis for referring his claim to the Immigration and Refugee Board and a deportation order was issued. Leave to commence a judicial review application was refused. The respondent's case was reviewed on humanitarian and compassionate grounds a number of times. After the last refusal the respondent unsuccessfully sought leave to commence an application for judicial review. The respondent subsequently brought an application in Ontario for a declaration that certain sections of the Immigration Act infringed his Charter rights. The respondent also brought a motion at the same time for an interlocutory injunction restraining the Minister from removing him. The appellant Minister took the position before the Ontario Court (General Division) that the Court should decline to exercise its jurisdiction on the ground that it was more appropriate for a Constitutional challenge to sections of the Immigration Act to be heard in the Federal Court.

In March, 1992 a motions judge granted the Minister's motion and stayed the respondent's application for declaratory and injunctive relief. The deportation order, however, was stayed by Galligan J.A. pending disposition of the respondent Reza's appeal to the Ontario Court of Appeal. In October, 1992 the Court of Appeal allowed the respondent Reza's appeal and ordered that the decision of the motions judge be set aside.

The Supreme Court of Canada allowed the Minister's appeal and was generally in agreement with the dissenting decision in the Court of Appeal of Ontario. The Supreme Court of Canada agreed that there was no basis for interfering with the motions court judge's decision to stay the proceedings. The Ontario Court and the Federal Court had concurrent jurisdiction to hear the respondent's application. Pursuant to section 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43, any judge of the General Division has a discretion to stay proceedings. The motions court judge properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum. The Court was of the view that this was the correct approach. The motions court judge took into account all relevant considerations in exercising his discretion to grant a stay and there was no basis for an appellate court to interfere with his decision. The appeal was allowed and the decision of the motions judge restored.

*Rafique v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-991, October 29, 1992, quashed Fed. C.A., Doc. No. A-1387-92, April 20, 1993.

The decision to extend or not the time for filing affidavits and representations in support of an application for leave to commence proceedings for judicial review is an integral aspect of the jurisdiction to consider the application for leave. No appeal to the Court of Appeal lies in relation to that decision and, accordingly, there is no authority in the Court to extend the time for filing a notice of appeal in respect of a decision refusing an extension of time for the filing of documents.

*Editor's Note:* Although the refugee provisions have changed and section 82.2 has been changed, the principle here may be of some importance.

*Duggal v. Canada (Min. of Employment & Immigration)*, (1992), 18 Imm. L.R. (2d) 20 (Fed. C.A.).

The Court of Appeal has no power to stay the execution of a removal order where it is deprived of jurisdiction by section 82.2(1) of the Immigration Act to entertain an appeal from a decision of the Trial Division. The power to stay can only be implied from the Court's power to hear an appeal. If such jurisdiction is denied, then the power to stay is absent. Not even the allegation that its Charter right is being violated can give the Court of Appeal a statutory jurisdiction to hear an appeal where Parliament has seen fit to withhold it.

***CERTIFICATION NECESSARY TO APPEAL — Commencement of appeal — Extension — Refusal not subject to appeal.***

**83. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.**

**(2) Where a judgment of the Federal Court — Trial Division is appealed to the Federal Court of Appeal pursuant to subsection (1), the appeal shall be commenced by filing a notice of appeal within fifteen days after the pronouncement of the judgment.**

**(3) A judge of the Federal Court — Trial Division may, for special reasons, extend the time referred to in subsection (2) for filing a notice of appeal.**

**(4) For greater certainty, a refusal of the Federal Court — Trial Division to certify that a serious question of general importance is involved in any matter is not subject to appeal. 1976-77, c. 52, s. 84; R.S.C. 1985 (4th Supp.), c. 28, s. 19; 1992, c. 49, s. 72.**

***Subsection (1)***

*Kayumba v. Canada (Solicitor General)*, Fed. T.D., Doc. No. IMM-6235-93, January 28, 1994.

The Court dismissed an application for a stay of execution of a deportation order. After rendering its decision, the Court was asked to certify a question pursuant to section 83(1). The Court ruled that section 83(1) did not give the Court jurisdiction to certify a question of general importance in connection with an application for a stay of execution of a deportation order.

*Sereno v. Canada (Solicitor General)* (1993), 75 F.T.R. 71.

The Court has no jurisdiction to certify a matter in connection with an application for a stay related to an application for leave made pursuant to section 82.1.

### **RULES — Inconsistencies.**

84. (1) Subject to the approval of the Governor in Council, the Chief Justice of the Federal Court may make rules governing the practice and procedure in relation to

- (a) applications under section 82.1 for leave to commence an application for judicial review,
- (b) applications for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder, and
- (c) appeals referred to in section 83,

and those rules shall be binding notwithstanding any rule or practice that would otherwise be applicable.

(2) In the event of an inconsistency between any of the provisions of sections 82.1 to 83 of this Act and any provision of the *Federal Court Act*, the provisions of this Act prevail to the extent of the inconsistency. 1976-77, c. 52, s. 85; R.S.C. 1985 (4th Supp.), c. 28, s. 19; 1992, c. 49, s. 72.

## **PART V OBLIGATIONS OF TRANSPORTATION COMPANIES**

**GENERAL LIABILITY FOR REMOVAL — Liability where U.S.A. refuses to allow return — Removal costs of persons not admitted — Reimbursement for removal costs of persons admitted — Application.**

85. (1) Subject to subsection (2), a transportation company that has brought a person to Canada may be required by the Minister to convey that person, or cause that person to be conveyed,

- (a) to the country from which that person came to Canada, or to such other country as the Minister may approve at the request of the company, in the case of a person who is allowed to leave Canada pursuant to subsection 20(1) or 23(4) or (4.2) or who is required to leave Canada by reason of the making of a rejection order;
- (b) to the United States, in the case of a person who is required to leave Canada by reason of the making of a direction to return to that country pursuant to subsection 20(2) or 23(5); or
- (c) to such country as is determined pursuant to subsection 52(2) or (3),



in the case of a person who is required to leave Canada by reason of the making of a removal order.

(2) Where a person referred to in subsection (1) has come to Canada through the United States and that country refuses to allow that person to return or to be returned to it, the transportation company that brought the person to the United States shall convey him or cause him to be conveyed

(a) in the case of a person referred to in paragraph (1)(a) or (b), to the country from which the person came to the United States or to such other country as may be approved by the Minister at the request of the transportation company; and

(b) in the case of a person referred to in paragraph (1)(c), to such country other than the United States as is determined pursuant to subsection 52(2) or (3).

(3) A transportation company is liable to pay all removal costs of any person whom it is required to convey or cause to be conveyed pursuant to this section if the person has not been granted admission and at the time of arrival in Canada was not in possession of a valid and subsisting visa.

(4) A transportation company is entitled to be reimbursed by Her Majesty for the removal costs that it incurs in conveying or causing to be conveyed pursuant to this section any person who has been granted admission or who at the time of arrival in Canada was in possession of a valid and subsisting visa.

(5) This section does not apply in relation to persons who enter Canada as or to become members of a crew. 1976-77, c. 52, s. 86; 1984, c. 40, s. 36; R.S.C. 1985 (4th Supp.), c. 28, s. 20; 1992, c. 49, s. 74.

### *Subsection (2)*

*Chan v. McFarlane*, [1962] O.R. 798 (Ont. C.A.).

The word "through" the United States in the Immigration Act, R.S.C. 1952, implied continuous transit through that country in the course of a journey to Canada from elsewhere; it did not include a situation where the respondent resided in the United States for 10 years before coming to Canada. The Court held that the respondent had come to Canada from the United States and not through the United States.

### **LIABILITY FOR REMOVAL OF MEMBERS OF CREW.**

86. Where a person enters Canada as or to become a member of a crew of a vehicle and ceases to be a visitor pursuant to subsection 26(1), the transportation company that operates that vehicle may be required by the Minister to convey that person, or cause that person to be conveyed, to the country from which that person came to Canada, or to such other country

as the Minister may approve at the request of the company, and the company is liable to pay all removal costs in respect of that person. 1976-77, c. 52, s. 87; R.S.C. 1985 (4th Supp.), c. 28, s. 21; 1992, c. 49, s. 75.

**TRANSPORTATION OF PERSONS ORDERED REMOVED — *Idem*, by other company — Reimbursement of costs.**

87. (1) Where, pursuant to section 85 or 86, a transportation company is required to convey a person, or cause a person to be conveyed, from Canada, it shall be notified of that requirement and be given an opportunity to convey that person, or to cause that person to be conveyed, on one of its own vehicles or otherwise.

(2) Where a transportation company referred to in subsection (1), after having been notified, is not prompt in furnishing transportation, the Minister may direct that arrangements be made for the removal from Canada, by another transportation company and at the expense of Her Majesty, of the person to be conveyed from Canada.

(3) The transportation company referred to in subsection (1) is liable, on demand, to reimburse Her Majesty for all removal costs incurred under subsection (2) in respect of the person conveyed from Canada. 1976-77, c. 52, s. 88; 1992, c. 49, s. 76.

**DUTIES OF TRANSPORTATION COMPANIES — No charge for transportation.**

88. (1) Every transportation company that is required to convey any person who is ordered removed from Canada, is rejected from Canada or is allowed or required to leave Canada shall

(a) detain and guard safely the person concerned until that person can be placed on board the vehicle on which he is to be conveyed; and

(b) accept on board such vehicle, guard safely and convey the person in accordance with the removal or rejection order or other order or direction.

(2) A transportation company referred to in subsection (1) shall, subject to any agreement between the company and the person being conveyed respecting return fares, refrain from, directly or indirectly, making any charge or taking any remuneration or security in respect thereof. 1976-77, c. 52, s. 89.

**DUTY TO PRESENT PASSENGER FOR EXAMINATION — Required facilities — Powers of Minister — Construction and repairs — Notice — Arbitration — Canada Labour Code.**

89. (1) A transportation company bringing persons to Canada shall, on the

arrival of each one of its vehicles in Canada, present each passenger seeking to come into Canada to an immigration officer for examination at such place as may be designated by a senior immigration officer and shall not allow any person to leave the vehicle

- (a) at any place other than that designated by a senior immigration officer; or
- (b) until permission has been granted by a senior immigration officer.

(2) The Minister may, in writing, require any transportation company to provide, equip and maintain free of charge to Her Majesty adequate areas, offices, laboratories and other facilities, including buildings, accommodation, equipment, furnishings and fixtures, for the proper interviewing, examination and detention of persons brought to Canada or to be removed from Canada via the vehicles, bridges, tunnels or airports of the company.

(3) The Minister may

- (a) cause to be made such improvements as the Minister considers desirable to any facility provided pursuant to subsection (2);
- (b) post, on or about the facility, any signs that the Minister considers appropriate for its operation or safe use; and
- (c) continue to use the facility for as long as the Minister requires it for the purposes mentioned in subsection (2).

(4) Where a facility pursuant to subsection (2) is not adequate for the purposes mentioned in that subsection, the Minister may require the transportation company to carry out any construction or repairs in order to render the facility adequate for those purposes, and if the transportation company fails to do so, the Minister may have the construction or repairs carried out and the transportation company shall be liable for all reasonable costs incurred by the Minister, which costs may be recovered by Her Majesty in right of Canada.

(5) A requirement under subsection (4) shall be communicated by the personal delivery of a notice to the transportation company or by sending the notice to the transportation company, and the notice may specify the period within which or the manner in which the construction or repairs are to be carried out.

(6) Subject to subsection (7) and to any regulations made under paragraph 114(1)(q.11), a dispute over the adequacy of a facility may be resolved by arbitration in accordance with the *Commercial Arbitration Act*.

(7) Any facility that fails to meet the applicable requirements of Part II of the *Canada Labour Code* shall be deemed not to be adequate for the purposes mentioned in subsection (2). 1976-77, c. 52, s. 90; 1992, c. 49, s. 77.



**DUTY TO CHECK TRAVEL DOCUMENTS — Application.**

**89.1 (1)** Every transportation company shall ensure that the persons it brings to Canada are in possession of all visas, passports and travel documents unless the visas, passports and travel documents are being held by the company in accordance with any regulations made under paragraph 114(1)(q.1).

**(2)** Subsection (1) applies from the time the transportation company embarks the persons at the final embarkation point before arrival in Canada until they are presented to an immigration officer for examination in accordance with subsection 89(1). R.S.C. 1985 (4th Supp.), c. 28, s. 22; 1992, c. 49, s. 78.

*R. v. Deutsche Lufthansa AG*, Ont. C.A., Doc. No. C17406, July 25, 1994.

Lufthansa was convicted of three charges under section 89.1. The facts were that an Iranian family of three was flown by Lufthansa from Germany to Canada. The family was using forged documents, purchased together with airline tickets from smugglers in Bombay, India. On arrival in Toronto, Canadian Immigration officers boarded the aircraft to carry out a discretionary and random pre-disembarkation screening. The officers walked up and down the aisles asking passengers to display their documents. The family displayed no documents and claimed refugee status.

The Summary Conviction Appeal judge held that Convention refugees require no travel documents. The Appeal judge found as a fact that one of the three people on the plane had been found to be a Convention refugee and, therefore, the Appeal judge set aside the convictions and acquitted Lufthansa on all three charges. The Summary Conviction Appeal judge reasoned that because a Convention refugee could not be prosecuted for, amongst other matters, not having travel documents, the carrier which had brought the refugee to Canada should not be prosecuted under section 89.1. This conclusion was found to be an error. Section 89.1 imposes an obligation on the carrier to ensure that a passenger has the appropriate travel documents. There is no more practical way of a carrier carrying out this obligation than physically checking the documents in the hands of the passenger. Whether the documents ultimately prove adequate or whether the passenger ultimately needs any documents at all are matters which are irrelevant to compliance with section 89.1.

Section 95.1(2) provides immunity for Convention refugees. That is a matter which concerns the passenger and Canada Immigration. It does not concern the carrier nor does it extend immunity to any carrier.

Lufthansa could not be convicted in this case because it had not presented the passengers to Immigration. The presentation of the passengers by the carrier to Canadian Immigration is an element of the offence under section 89.1. What happened here is that pursuant to section 90(1) immigration officers boarded and inspected the aircraft as well as the persons on it. Presentation by the airline never occurred and therefore these prosecutions were premature.

Accordingly, the acquittals of the airline by the Summary Conviction Appeal judge were confirmed, although on a different basis.

*R. v. KLM Royal Dutch Airlines, N.V.* (1993), 22 Imm. L.R. (2d) 63 (Ont. Gen. Div.).

Three passengers were originally scheduled to fly from Damascus to Chicago. They missed their connecting flight in Amsterdam and were rerouted to Chicago via Toronto. All three passengers sought entry to Canada for the purpose of travelling onward to the United States. All three were granted entry pursuant to section 19(3) of the Immigration Act.

The prosecution of KLM for an offence contrary to section 89.1 failed because the prosecution failed to prove that the passengers did not possess the documents required by the Immigration Act and regulations.

In fact, all three were lawfully admitted to Canada on such documents as they did possess. Accordingly, KLM's appeal from its conviction was allowed.

### ***RIGHTS OF IMMIGRATION OFFICERS — Order to detain on board vehicle.***

#### **90. (1) Immigration officers may**

- (a) board and inspect any vehicle bringing persons to Canada;**
- (b) examine any person carried by that vehicle;**
- (c) examine any record or document respecting any such person and seize and remove any such record or document for the purpose of obtaining copies thereof or extracts therefrom; and**
- (d) hold that vehicle until the inspection and examination are completed.**

**(2) An immigration officer may order the master of a vehicle to detain and guard safely on board the vehicle any person who arrived in Canada on that vehicle and who**

- (a) is not seeking admission to Canada;**
  - (b) has been allowed to leave Canada pursuant to subsection 20(1) or 23(4) or (4.2); or**
  - (c) is required to leave Canada by reason of the making of a rejection order.**
- 1976-77, c. 52, s. 91; 1992, c. 49, s. 79.**

*Editor's Note:* Section 90.1 was enacted by R.S.C. 1985 (4th Supp.), c. 29, s. 8(1) and became effective October 3, 1988. Section 90.1 was subsequently amended by R.S.C. 1985 (4th Supp.), c. 28, s. 35, effective January 1, 1989. By virtue of R.S.C. 1985 (4th Supp.), c. 29, s. 8(2), section 90.1 ceased to be in force July 1, 1989.

### ***DIRECTION NOT TO ENTER CANADA'S WATERS — Conditions — Direction that vehicle be escorted to port — Certificate is conclusive proof — Definitions — "Internal waters of Canada" — "Territorial sea of Canada" — "Vehicle".***

**90.1 (1) Subject to subsection (2), where the Minister believes on reasonable grounds that a vehicle within twelve nautical miles of the outer limit of the territorial sea of Canada is bringing any person into Canada in contravention**

of this Act or the regulations, the Minister may direct the vehicle not to enter the internal waters of Canada or the territorial sea of Canada, as the case may be, and any such direction may be enforced by such force as is reasonable in the circumstances.

(2) The Minister may make a direction under subsection (1) where the Minister is satisfied that

- (a) the vehicle can return to its port of embarkation without endangering the lives of its passengers;
- (b) all passengers who seek Convention refugee status and are nationals or citizens of the country where the vehicle embarked them have been removed from the vehicle and brought into Canada;
- (c) the country where the vehicle embarked its passengers is a signatory to the Convention and complies with Article 33 thereof; and
- (d) the country would allow the passengers to return to that country or to have the merits of their claims to Convention refugee status determined therein.

(3) Where the Minister believes on reasonable grounds that a vehicle within

- (a) the internal waters of Canada, or
- (b) the territorial sea of Canada

is bringing any person into Canada in contravention of this Act or the regulations, the Minister may direct that the vehicle be escorted to the nearest port of disembarkation and any such direction may be enforced by such force as is reasonably necessary.

(4) For the purposes of this section, a certificate issued by or under the authority of the Secretary of State for External Affairs containing a statement that any geographic location specified in the certificate was, at any time referred to therein, within

- (a) the internal waters of Canada,
- (b) the territorial sea of Canada, or
- (c) twelve nautical miles of the outer limit of the territorial sea of Canada

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

(5) In this section,

“internal waters of Canada” has the meaning assigned to that term by subsection 3(2) of the *Territorial Sea and Fishing Zones Act*;

“territorial sea of Canada” has the meaning assigned to that term by subsection 3(1) of the *Territorial Sea and Fishing Zones Act*;



“vehicle” means a vehicle used for transportation by sea. R.S.C. 1985 (4th Supp.), c. 28, s. 35; c. 29, s. 8.

*MEDICAL TREATMENT — Costs of medical treatment, etc. — Costs of attendant accompanying sick person — Medical and hospital costs for crew members.*

91. (1) Where a medical officer is of the opinion that a person seeking to come into Canada is or may be, either pending his admission or pending his leaving Canada where admission has not been granted, suffering from sickness or mental or physical disability or has been in contact with a contagious or infectious disease, a senior immigration officer or a medical officer may direct that the person

(a) be afforded medical treatment or held for observation and diagnosis on board the vehicle by which he was brought to Canada or at an immigrant station; or

(b) be taken to a suitable hospital or other place for treatment, observation and diagnosis.

(2) Any costs of treatment, medical attention and maintenance incurred with respect to a person described in subsection (1) may be recovered from the transportation company that brought the person to Canada unless that person is in possession of a valid and subsisting visa and the transportation company establishes to the satisfaction of the Deputy Minister that that person's condition is not a result of any negligence of the transportation company.

(3) A senior immigration officer or a medical officer may, where he considers it advisable for the proper care of a person referred to in subsection (1), authorize that a member of the person's family or other suitable attendant be kept with the person during his period of medical attention and treatment, including, where applicable, the person's journey to the port of entry from which the person will leave Canada, and the costs thereof may be recovered from the transportation company that brought the person referred to in subsection (1) to Canada where costs of treatment, medical attention and maintenance may be recovered from the transportation company pursuant to subsection (2).

(4) Where a person who is a member of the crew of a vehicle receives medical treatment or is hospitalized in Canada, the transportation company of whose vehicle that person is a member of the crew shall pay all costs incurred for the medical treatment or hospitalization as well as all costs incurred with respect to the departure from Canada of that person. 1976-77, c. 52, s. 92; 1984, c. 40, s. 36.

**ADMINISTRATION FEES — PRELIMINARY ASSESSMENT — Notice and written submissions — Final assessment and notice — Deemed final assessment — Liability.**

91.1 (1) The Minister may, in accordance with the regulations, make a preliminary assessment of an administration fee against a transportation company in respect of any member of a class of persons prescribed for the purposes of this section

(a) who is brought to Canada by the company and who is the subject of a report pursuant to paragraph 20(1)(a) or a report pursuant to paragraph 27(2)(f) for having eluded examination; or

(b) who enters Canada as or to become a member of the crew of a vehicle operated by the company and who is the subject of a report pursuant to paragraph 27(2)(e) as a member of a crew who has ceased to be a visitor pursuant to paragraph 26(1)(c.1).

(2) Notice of a preliminary assessment under subsection (1) shall be given to a transportation company in accordance with any regulations and, within thirty days after the notice is given, the company may file written submissions with the Minister regarding the assessment.

(3) After considering any submissions filed under subsection (2), the Minister may confirm, vary or rescind the preliminary assessment and the company shall, in accordance with any regulations, be given notice of the final assessment.

(4) Where notice is given pursuant to subsection (2) and no written submission is filed within the period referred to in that subsection, the preliminary assessment shall be deemed to be a final assessment, and the transportation company shall be liable under the assessment on the day that immediately follows the expiration of that period.

(5) Where notice of final assessment is given to a transportation company pursuant to subsection (3), the transportation company shall be liable under the assessment on the day the notice of final assessment is sent to the company. 1992, c. 49, s. 80.

**GENERAL SECURITY — Special purpose security — Additional security — Failure to comply with directions — Failure to pay amounts — Detention of vehicles — Notice of seizure — Return or sale of seized vehicle — Liable for costs — Notice of sale — Application of proceeds of sale — Surrender of security.**

92. (1) The Deputy Minister may issue a direction to any transportation company requiring it to deposit with Her Majesty in right of Canada such sum of money, in Canadian currency, or such other prescribed security as the Deputy Minister deems necessary as a guarantee that the company will pay

all amounts for which it may become liable under this Act after the direction is issued.

(2) Where a vehicle owned or operated by a transportation company that has not deposited the required sum of money or other security pursuant to a direction issued under subsection (1) comes into Canada, the Deputy Minister may issue a direction to the master of the vehicle or to the transportation company requiring the master or company to deposit with Her Majesty in right of Canada such sum of money, in Canadian currency, or such other prescribed security as the Deputy Minister deems necessary as a guarantee that the company will pay all amounts for which it may become liable under this Act in respect of that vehicle after the direction is issued.

(3) Where the Deputy Minister is of the opinion that any security deposited pursuant to a direction under subsection (1) or (2) does not provide a sufficient guarantee that the transportation company will pay the amounts, the Deputy Minister may issue a direction to the master or the company that deposited the security requiring the master or company to deposit with Her Majesty in right of Canada such sum of money, in Canadian currency, as the Deputy Minister deems necessary as additional security.

(4) Where a master or transportation company fails to comply with a direction under subsection (1), (2) or (3), the Minister may direct an immigration officer

(a) to detain any vehicle of the transportation company for a period of not more than forty-eight hours; or

(b) to seize and hold any vehicle of the company, including any vehicle detained pursuant to paragraph (a).

(5) Where a transportation company becomes liable to pay any amount under this Act and the required sum of money or prescribed security has not been deposited in respect of the transportation company pursuant to a direction under subsection (1), (2) or (3), the Minister may direct that an immigration officer

(a) detain any vehicle of the company for a period of not more than forty-eight hours; or

(b) seize and hold any vehicle of the company, including any vehicle detained pursuant to paragraph (a).

(5.1) A transportation company shall comply with the orders of an immigration officer given pursuant to a direction to detain a vehicle of the company under subsection (4) or (5).

(6) A person who seizes a vehicle pursuant to a direction under subsection (4) or (5) shall take such measures as are reasonable in the circumstances to give notice of the seizure to any person who the person seizing the vehicle believes



on reasonable grounds is entitled to make an application under section 93.1 in respect of the vehicle.

(7) Where a vehicle of a transportation company is seized pursuant to a direction under subsection (4) or (5), the Minister may

(a) return the vehicle to the master of the vehicle or to the company on receipt of

(i) an amount equal to the value of the vehicle at the time of its seizure, as determined by the Minister, or any lesser amount acceptable to the Minister, or

(ii) an amount equal to the expense of holding the vehicle and either compliance with the direction to deposit security or receipt of the amount that the company is liable to pay, as the case may be; or

(b) on the expiration of thirty days after the seizure, have the vehicle sold by public auction.

(7.1) Where a vehicle of a transportation company is detained pursuant to a direction under subsection (4) or (5), the transportation company shall be liable for all costs that related to the detention of the vehicle.

(8) Notice of a sale under subsection (7) setting out the time and place thereof and a general description of the vehicle to be sold shall be published a reasonable time before the vehicle is sold at least once in one or more newspapers of general circulation in the area where the sale is to be held.

(9) Any surplus remaining from a sale under subsection (7) after deduction of the sum or other security required to be deposited or the fine or amount, as the case may be, and the expenses incurred in holding and selling the vehicle shall be paid to the transportation company.

(10) Any sum or prescribed security deposited pursuant to a direction under subsection (1), (2) or (3) may be returned or cancelled on a direction from the Deputy Minister that the sum or security is no longer required. 1976-77, c. 52, s. 93; R.S.C. 1985 (4th Supp.), c. 28, s. 23; 1992, c. 49, s. 81.

### *CERTIFICATES — Judgments — Costs.*

92.1 (1) Where a master of transportation company does not deposit the required sum of money or other security in accordance with a direction under subsection 92(1), (2) or (3), the Minister may, on the expiration of thirty days after the date of the direction, certify that it has not been deposited.

(2) On production to the Federal Court, a certificate under subsection (1) shall be registered in that Court and, when registered, the certificate has the same effect, and all proceedings may be taken to enforce it, as if it were a

judgment obtained in that Court for a debt of the amount specified in the certificate.

(3) The fees for registering the certificate are recoverable in the same way as if they had been certified and the certificate had been registered under this section. 1992, c. 49, s. 82.

#### *DEDUCTION FROM SECURITY IN CERTAIN CASES.*

93. The Minister, on giving written notice to a transportation company, may direct that any amount for which the transportation company is liable pursuant to subsection 85(3), section 86, subsection 87(3) or section 91, or any administration fee finally assessed against the transportation company pursuant to section 91.1, be deducted from any sum of money deposited as a guarantee in respect of the company pursuant to a direction under subsection 92(1), (2) or (3), or be realized from any prescribed security so deposited. 1976-77, c. 52, s. 94; R.S.C. 1985 (4th Supp.), c. 28, ss. 23, 35; 1992, c. 49, s. 82.

*CLAIMING INTEREST — Day of hearing — Notice — Service of notice — Order that interest not affected — Appeal — Return of vehicle — Limit on amount paid — Definitions — “Court of appeal” — “Judge”.*

93.1 (1) Where a vehicle has been seized pursuant to a direction under subsection 92(4) or (5), any person, other than the master of the vehicle or the transportation company, who claims an interest in the vehicle as owner, mortgagee, lien holder or holder of any like interest may, within sixty days after the seizure, apply by notice in writing to a judge for an order under subsection (5).

(2) The judge to whom an application is made under subsection (1) shall fix a day for a hearing of the application not less than thirty days after the day of filing of the application.

(3) A person making an application under subsection (1) shall serve a notice of the application and of the hearing on the Minister not later than fifteen days after a day for the hearing of the application is fixed pursuant to subsection (2).

(4) The service of a notice under subsection (3) is sufficient if it is sent by registered mail addressed to the Minister.

(5) Where, on the hearing of an application made under subsection (1), it is made to appear to the satisfaction of the judge that the applicant acquired the interest in respect of which the applicant is applying in good faith prior to the seizure, the applicant is entitled to an order declaring that the applicant's interest is not affected by the seizure and declaring the nature and extent of the applicant's interest.

(6) A person who makes an application under subsection (1) or the Minister may appeal to the court of appeal from an order made under subsection (5) and the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the court of appeal from orders or judgments of a judge.

(7) The Minister shall, on application made to the Minister by a person who has obtained a final order under this section,

(a) direct that the vehicle to which the interest of the person relates be returned to the person; or

(b) direct that an amount equal to the value of the interest of the person, as declared in the order, be paid to the person.

(8) The total amount paid under paragraph (7)(b) in respect of a vehicle shall, where the vehicle was sold or otherwise disposed of under this Act, not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the vehicle, and, where there are no proceeds of a disposition of a vehicle under this Act, no payment shall be made pursuant to paragraph (7)(b) in respect of the vehicle.

(9) In this section,

“court of appeal” means, in the province in which an order under this section is made, the court of appeal for that province as defined in the definition “court of appeal” in section 2 of the *Criminal Code*;

“judge” means

(a) in the Province of Quebec, a judge of the Superior Court for the district in which the vehicle, in respect of which an application for an order under this section is made, was seized,

(a.1) in the Province of Ontario, a judge of the Ontario Court (General Division),

(b) in the Provinces of Nova Scotia and British Columbia, a judge of the county or district court of the county or district in which the vehicle was seized,

(c) in the Provinces of Nova Scotia, British Columbia, Prince Edward Island and Newfoundland, a judge of the Supreme Court thereof,

(d) in the Provinces of New Brunswick, Manitoba, Alberta and Saskatchewan, a judge of the Court of Queen’s Bench thereof, and

(e) in the Yukon Territory and the Northwest Territories, a judge of the Supreme Court thereof. R.S.C. 1985 (4th Supp.), c. 28, s. 23; 1990, c. 16, s. 12; c. 17, s. 23; 1992, c. 51, s. 52.

(e) in the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court thereof. [1993, c. 28, s. 78 (Sched. III, item 71). Not in force at date of publication.]



**PART VI  
ENFORCEMENT**

**Offences and Punishment**

***SPECIFIC OFFENCES RESPECTING IMMIGRATION — Punishment.***

**94. (1)** Every person is guilty of an offence who

(a) comes into Canada at any place other than a port of entry and fails to appear before an immigration officer for examination as required by subsection 12(1);

(b) comes into Canada or remains in Canada by use of a false or improperly obtained passport, visa or other document pertaining to the admission of that person or by reason of any fraudulent or improper means or misrepresentation of any material fact;

(c) [Repealed 1992, c. 49, s. 83.]

(d) escapes or attempts to escape from lawful custody or detention under this Act;

(e) knowingly fails to comply with any term or condition subject to which that person was released from detention pursuant to paragraph 23(3)(b) or subsection 103(3), (3.1), (5) or (7);

(f) eludes examination or inquiry under this Act or, having received a summons under this Act, fails, without valid excuse, to attend an inquiry or a hearing or, where required by any such summons, to produce any document, book or paper that the person has or controls relative to the subject-matter of the inquiry or hearing;

(g) refuses to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at the examination, inquiry or hearing under this Act;

(h) knowingly makes any false or misleading statement at any examination, inquiry or hearing under this Act or in connection with the admission of any person or the application for admission by any person;

(h.1) provides information to a senior immigration officer for the purposes of subsection 23(4.1), 27(5) or 45(5) knowing that information to be false or misleading;

(i) knowingly makes a false promise of employment or any false representation by reason of which a person is induced to seek admission or is assisted in any attempt to seek admission or by reason of which that person's admission is procured;

(j) for the purpose of encouraging, inducing, deterring or preventing immigration into Canada, publishes, disseminates or causes or procures the publication or dissemination of any false or misleading information or representations as to the opportunities for employment in Canada or other

false or misleading information or representations, knowing that the information or representations are false or misleading;

(k) remains in Canada without the written authority of an immigration officer after having ceased to be a visitor;

(l) knowingly contravenes any existing term or condition subject to which that person was granted admission or contravenes any term or condition added or as varied pursuant to subsection 17(2); or

(m) knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene any provision of this Act or the regulations.

(2) Every person who is guilty of an offence under subsection (1) is liable

(a) on conviction on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both; or

(b) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both. 1976-77, c. 52, s. 95; R.S.C. 1985 (4th Supp.), c. 28, s. 24; 1992, c. 49, s. 83.

### *Subsection (1)*

#### *Paragraph (b)*

*R. v. Grospe* (1988), 6 W.C.B. (2d) 44.

Section 95(b) creates a single offence that can be committed in a number of different ways, rather than a number of separate and distinct offences. The fact that the accused could have been charged with committing the offence under section 95(b) of the Act in a different way, did not mean that the present offence was not proven. In this case, the accused had made materially false statements on an application for permanent residence. The accused had argued that the Crown should have charged her with misrepresentation of a material fact rather than entering Canada by use of an improperly obtained visa. The accused was convicted.

*R. v. Ferreira*, Ont. Prov. Ct., July 7, 1986 (Orally).

The accused was charged with entering Canada by improper means, and those means were specified as a fraudulent United States visitor's visa contained in his Portuguese passport. Despite the fact that an American visa is not a condition precedent for entering Canada and that tendering a fraudulent American visa would not, therefore, be misrepresenting a material fact, it was still held that to offer knowingly a passport containing an apparently unexpired but forged American visa constituted an attempt to come into Canada by improper means. The Court found that the accused knew that the American visa was fraudulent, and a conviction was registered.

#### *Paragraph (g)*

*Bowen v. Min. of Employment & Immigration*, [1984] 2 F.C. 507 (Fed. C.A.).

The applicant initially refused to testify at the inquiry on the advice of her counsel but later retreated from this position also on the advice of her counsel. The Commission,

however, presented its case without the applicant's testimony. Section 11(c) of the Charter of Rights was held to be inapplicable to the applicant because it could not be said that the applicant was being compelled to be a witness at her inquiry when the counsel, representing her, conceded her compellability as a witness. It was further held that section 11(c) of the Charter had no application to the testimony to be given by the applicant because the applicant could not be said to be "a person charged within an offence." The Court observed that section 24 of the Charter did not apply because it was a condition precedent to the operation of that section that a person's rights or freedoms as guaranteed by the Charter not to be infringed or denied. The Court having decided that the applicant's rights or freedoms, as guaranteed by the Charter had not been infringed or denied, was of the view that the conditions precedent to the operation of section 24 had not been met.

*R. v. Wooten* (1983), 9 C.C.C. (3d) 513 (B.C. S.C.).

This was an appeal by the Crown from an acquittal of the respondent of an offence under section 95(g) of the Immigration Act. The respondent was arrested and detained on the grounds that he was in Canada without the permission of the Minister and that he had falsely represented material fact to enable him to remain in the country. During the inquiry, the case presenting officer sought to call the respondent as a witness. The respondent's counsel objected. The adjudicator ruled against the respondent on this question. The respondent was sworn as a witness but refused to answer any questions. The respondent was charged under section 95(g) and acquitted on the basis that section 95(g) was inoperative as it offended sections 7 and 11(c) of the Charter of Rights. The respondent was held not to be a person "charged with an offence" and, therefore, not subject to the protection of section 11(c) of the Charter. The Court adopted previous decisions which had characterized immigration inquiries as civil proceedings. Section 7 of the Charter was not applicable because the inquiry was a civil proceeding and there was, therefore, nothing fundamentally unjust in compelling the person who was the subject of the immigration inquiry to testify.

*Re Sondhi*, Ont. Prov. Ct., August 17, 1983.

Section 11(c) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, does not apply to an applicant testifying before an inquiry because the applicant is not "charged" with an offence in that proceeding.

*R. v. Forrester* (1982), 2 C.C.C. (3d) 467 (Ont. C.A.).

The appellant answered a number of questions at an inquiry before refusing to answer a question on the grounds that her answer might tend to incriminate her and declining an offer of the protection of the Canada Evidence Act, R.S.C. 1970, c. E-10. The Ontario Court of Appeal upheld her conviction under section 95 and adopted the reasons of the Federal Court in *Chana* (summarized below).

*Webb v. Min. of Manpower & Immigration*, [1982] 1 F.C. 687 (Fed. C.A.).

Where the applicant does not refuse to testify, the principles enunciated in section 2(d) of the Canadian Bill of Rights, R.S.C. 1970, App. III, do not avail. The Court left open the correctness of the decision in *Cole*.



*R. v. Cole*, [1980] 6 W.W.R. 552 (Man. Co. Ct.), leave to appeal denied [1981] 1 W.W.R. 596 (Man. C.A.).

A person who fails to answer questions put to him at an immigration inquiry may not be prosecuted for an offence under section 95(g) owing to the protection in section 2(d) of the Canadian Bill of Rights, R.S.C. 1970, App. III, with respect to self-incrimination.

*Chana v. Min. of Manpower & Immigration*, [1977] 2 F.C. 496 (Fed. T.D.).

An alien was a compellable witness at a special inquiry under the old Act. The alien's rights under section 2(d) of the Canadian Bill of Rights, R.S.C. 1970, App. III, were not violated because the alien was entitled to retain counsel and was fully safeguarded against incriminating himself by virtue of the Canada Evidence Act, R.S.C. 1970, c. E-10.

### **Paragraph (k)**

*R. v. Malhotra*, [1981] 2 W.W.R. 560 (Man. Prov. Ct.).

There was some evidence that the accused engaged in employment. Section 26(1)(b) of the Act operated to strip the accused of his status as a visitor. Therefore, there was a *prima facie* case against the accused under this section.

*R. v. Malhotra (No. 1)*, [1981] 2 W.W.R. 563 (Man. Prov. Ct.).

Section 95(k) creates an offence of absolute liability.

### **Paragraph (m)**

*R. v. Jupiter* (1983), 35 C.R. (3d) 286 (Ont. Co. Ct.).

The Court noted that while it is common to speak of aiding and abetting, the two concepts are not the same and either activity constitutes a sufficient basis for liability under this section. Abetting is defined as instigating, promoting or procuring a crime to be committed, while aiding means assisting or helping without necessarily encouraging or instigating the act. While the appellant was motivated by the highest principles of family concern, the Court noted that as a general proposition if a person aids another, knowing that the other intends to commit an offence, he aids in that offence even if his motive is something else. Accordingly, the appeal in this case was dismissed and the conviction affirmed.

## **ORGANIZING ENTRY INTO CANADA.**

**94.1** Every person who knowingly organizes, induces, aids or abets or attempts to organize, induce, aid or abet the coming into Canada of a person who is not in possession of a valid and subsisting visa, passport or travel document where one is required by this Act or the regulations is guilty of an offence and liable

(a) on conviction on indictment, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding five years, or to both;  
or

(b) on summary conviction, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year, or to both. R.S.C. 1985 (4th Supp.), c. 29, s. 9; 1992, c. 49, s. 84.

### *IDEM.*

94.2 Every person who knowingly organizes, induces, aids or abets or attempts to organize, induce, aid or abet the coming into Canada of a group of ten or more persons who are not in possession of valid and subsisting visas, passports or travel documents where such visas, passports or travel documents are required by this Act or the regulations is guilty of an offence and is liable on conviction on indictment to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding ten years, or to both. R.S.C. 1985 (4th Supp.), c. 29, s. 9.

### *NO PROCEEDINGS WITHOUT CONSENT.*

94.3 No proceedings for an offence under section 94.1 or section 94.2 shall be instituted except by or with the personal consent in writing of the Attorney General of Canada or Deputy Attorney General of Canada. R.S.C. 1985 (4th Supp.), c. 29, s. 9.

### *DISEMBARKING PERSONS AT SEA.*

94.4 Every person who, being the master or a member of a crew of a vehicle used for transportation by sea, disembarks or allows the disembarkation of, or attempts to disembark or attempts to allow the disembarkation of, a person or group of persons at sea for the purpose of inducing, aiding or abetting that person or group of persons to come into Canada in contravention of this Act or the regulations is guilty of an offence and is liable on conviction on indictment to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding ten years, or to both. R.S.C. 1985 (4th Supp.), c. 29, s. 9.

### *COUNSELLING FALSE STATEMENTS.*

94.5 Every person who knowingly counsels, induces, aids or abets, or who knowingly attempts to counsel, induce, aid or abet, any other person to make any false or misleading statement in connection with a claim by that other person to be a Convention refugee is guilty of an offence and liable

(a) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both. R.S.C. 1985 (4th Supp.), c. 29, s. 9.

**OFFENCES RELATING TO APPROVED BUSINESSES OR FUNDS —  
Punishment.**

**94.6 (1)** Every person is guilty of an offence who

(a) knowingly submits any false or misleading information to the Minister in relation to an application for the approval of a business or fund or in a report required in relation to an approved business or fund;

(b) knowingly makes any false or misleading representation about an approved business or fund or falsely represents that a business or fund is approved;

(c) manages or controls an approved business or fund and fails to comply with any term or condition governing the approval; or

(d) fails to do anything that the person is required to do under paragraph 102.001(2)(b) or section 102.003.

(2) Every person who is guilty of an offence under subsection (1) is liable

(a) on conviction on indictment,

(i) for the first offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both,  
or

(ii) for a subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding five years, or to both;  
or

(b) on summary conviction,

(i) for a first offence, to a fine not exceeding fifty thousand dollars, or

(ii) for a subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.  
1992, c. 49, s. 85.

**OFFENCE WHERE RETURN IS WITHOUT MINISTER'S CONSENT.**

**95.** Every person against whom a removal order is made who is removed from or leaves Canada and comes into Canada contrary to subsection 55(1) or (2) is guilty of an offence and liable

(a) on conviction on indictment, to imprisonment for a term not exceeding two years; or

(b) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both. 1976-77, c. 52, s. 96.

*R. v. Maunder* (1983), 46 Nfld. & P.E.I.R. 361, 135 A.P.R. 361 (Nfld. C.A.).

The appellant appealed a sentence of one year imposed under section 96. The appeal



was dismissed because the appellant had disregarded other deportation orders and following his removal from Canada pursuant to such orders, had returned to Canada without the consent of the Minister and engaged in criminal activity.

*R. v. Singh* (1982), 63 C.C.C. (2d) 156 (Man. Co. Ct.).

The onus is upon the accused to demonstrate that he had lawful authority to enter Canada. The required ministerial consent was an excuse contemplated by section 730 of the Code, the proof of which rested upon the accused. An inference of the existence of ministerial consent did not arise from the admission of the accused to Canada as a visitor because the official who admitted the accused did not have the authority of the Minister to give the required consent. Although this offence is one of strict liability, the accused failed to prove that he used due diligence to avoid committing the offence.

### ***DEFERRAL — Exemption's — Exceptions.***

**95.1. (1) No person who claims to be a Convention refugee and has notified an immigration officer of the claim shall, pending disposition of the claim, be charged with or convicted of**

- (a) an offence under paragraph 94(1)(a), (b), (k) or (l),**
- (b) an offence under paragraph 94(1)(f), (g) or (h) in relation to an examination of that person under this Act,**
- (c) an offence under section 95 or 98 in relation to the coming into Canada of that person or an examination of that person under this Act, or**
- (d) an offence under section 57, paragraph 340(c) or any of sections 354, 366, 368, 374 or 403 of the *Criminal Code* in relation to the coming into Canada of the person,**

**if that person came to Canada directly from the country that the person left, or outside of which the person remains, by reason of fear of persecution.**

**(2) No person who is determined by the Refugee Division to be a Convention refugee shall be charged with or convicted of**

- (a) an offence under paragraph 94(1)(a), (b), (k) or (l),**
- (b) an offence under paragraph 94(1)(f), (g) or (h) in relation to an examination of that person under this Act,**
- (c) an offence under section 95 or 98 in relation to the coming into Canada of that person or an examination of that person under this Act, or**
- (d) an offence under section 57, paragraph 340(c) or any of sections 354, 366, 368, 374 or 403 of the *Criminal Code* in relation to the coming into Canada of the person,**

**if that person came to Canada directly from the country that the person left, or outside of which the person remains, by reason of fear of persecution.**

**(3) Subsections (1) and (2) do not apply to any person who fails to notify**

an immigration officer of a claim to be a Convention refugee before the day that is

(a) three months after the expiry of the period during which the person is authorized to remain in Canada, in the case of a person who came into Canada as a visitor or under the authority of a permit; or

(b) three months after the person last came into Canada, in any other case.  
R.S.C. 1985 (4th Supp.), c. 28, s. 25; 1992, c. 49, s. 86.

**UNAUTHORIZED EMPLOYMENT OF VISITORS AND OTHERS —**  
*Deemed knowledge — Identifiable special Social Insurance Number cards.*

96. (1) Every person who knowingly engages in any employment any person, other than a Canadian citizen or permanent resident, who is not authorized under this Act to engage in that employment is guilty of an offence and is liable

(a) on conviction on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both; or

(b) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) For the purposes of subsection (1), a person knowingly engages in any employment a person who is not authorized to engage in that employment where, by the exercise of reasonable diligence, he would have known that the person was not so authorized.

(3) The Minister may by order direct the Canada Unemployment and Immigration Commission established under the *Employment and Immigration Department and Commission Act* to issue to persons, other than Canadian citizens or permanent residents, Social Insurance Number Cards whereby the holders thereof are identified as persons who may be required by or under this Act to obtain authorization to engage or continue in employment in Canada.  
1976-77, c. 52, s. 97; c. 54, s. 74.

**OFFENCES RESPECTING IMMIGRATION OFFICERS AND ADJUDICATORS —**  
*Punishment.*

97. (1) Every person is guilty of an offence who

(a) being an immigration officer or an adjudicator, wilfully makes or issues any false document or statement in respect of any matter relating to his duties under this Act or accepts, agrees to accept or induces or assists any other person to accept any bribe or other benefit in respect of any matter relating to his duties under this Act or otherwise wilfully fails to perform his duties under this Act;

(b) being an immigration officer or an adjudicator, contravenes any provision

of this Act or the regulations or knowingly induces, aids or abets or attempts to induce, aid or abet any other person to do so;

(c) gives, offers or promises to give any bribe or consideration of any kind to, or makes any agreement or arrangement with, an immigration officer or an adjudicator to induce him in any way not to perform his duties under this Act;

(d) not being an immigration officer or an adjudicator, personates or holds himself out to be an immigration officer or an adjudicator, or takes or uses any name, title, uniform or description or otherwise acts in any manner that may reasonably lead any person to believe that he is an immigration officer or an adjudicator; or

(e) obstructs or impedes an immigration officer or an adjudicator in the performance of his duties under this Act.

(2) Every person who is guilty of an offence under subsection (1) is liable

(a) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both. 1976-77, c. 52, s. 98.

### *Subsection (2)*

*R. v. MacInnis* (1991), 95 Nfld. & P.E.I.R. 332, 301 A.P.R. 332 (Nfld. T.D.).

The accused, a former Immigration officer, pleaded guilty to 11 counts of breach of section 97(1)(a) of the Immigration Act. The accused had accepted a benefit, namely sexual intercourse, from two young women in respect of matters relating to his duties under the Immigration Act, namely assessing and granting applications for temporary entry to Canada. The remaining nine counts in the indictment related to the issuance of Canadian visas by the accused as a result of his wilfully failing to perform his duties by properly assessing these persons.

In cases of this nature, a breach of trust is the major factor. The accused, as an Immigration officer, was in a position of trust being placed there by the Department of Immigration. Society generally must have confidence that those persons occupying positions of public trust are worthy of the trust that is placed in them. Such persons must act in the utmost good faith and when they do not, not only must they be deterred but a sentence must be imposed so that others similarly situated will also be deterred.

The two counts of accepting sexual intercourse as a benefit resulted in a six-month sentence on each count concurrent. The other nine counts resulted in a sentence of three months consecutive to the six-month sentence. Thus the total length of imprisonment was nine months.



**OFFENCE RELATING TO TRANSPORTATION COMPANIES — GENERAL**  
— *Failure to check travel documents — Failure to comply with designated regulations — Due diligence defence.*

97.1 (1) Every person who contravenes subsection 88(1), 89(1), 90(2) or 92(5.1), or any provision of the regulations designated pursuant to paragraph 114(1)(q.12) for the purposes of this subsection, is guilty of an offence and liable on summary conviction

- (a) for a first offence, to a fine not exceeding ten thousand dollars; or
- (b) for a subsequent offence, to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding six months, or to both.

(2) Every person who contravenes section 89.1 is guilty of an offence and liable

- (a) on conviction on indictment,

- (i) for a first offence, to a fine not exceeding twenty-five thousand dollars, or
- (ii) for a subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding three years, or to both; or

- (b) on summary conviction,

- (i) for a first offence, to a fine not exceeding ten thousand dollars, or
- (ii) for a subsequent offence, to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding six months, or to both.

(3) Every person who contravenes any provision of the regulations designated pursuant to paragraph 114(1)(q.12) for the purposes of this subsection is guilty of an offence and liable on summary conviction

- (a) for a first offence, to a fine not exceeding five thousand dollars; or
- (b) for a subsequent offence, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both.

(4) No person shall be found guilty of an offence under this section if it is established that the person exercised all due diligence to prevent its commission. 1992, c. 49, s. 87.

**GENERAL PUNISHMENT.**

98. Every person who knowingly contravenes any provision of this Act or the regulations or any order or direction lawfully made or given thereunder for which no punishment is elsewhere provided in this Act is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars

or to imprisonment for a term not exceeding one year, or to both. 1976-77, c. 52, s. 99; 1992, c. 49, s. 87.

*R. v. Gravell* (1988), 5 W.C.B. (2d) 365.

Section 12(1) of the Immigration Act provides that every person seeking to come into Canada should appear before an immigration officer at the port-of-entry. The accused, who was a status Indian, had crossed an international boundary by going under a closed gate at customs.

The Court held that the combination of section 12(1) and section 99 of the Immigration Act, created an offence of strict liability rather than absolute liability. On the particular facts of this case, the accused was acquitted.

### ***OFFICERS, ETC., OF CORPORATIONS — Offences by employees or agents.***

99. (1) Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation is prosecuted or convicted.

(2) In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that the accused exercised all due diligence to prevent its commission. 1976-77, c. 52, s. 100.

### ***OFFENCES OUTSIDE CANADA.***

100. Any act or omission that would by reason of this Act or the regulations be punishable as an offence if committed in Canada is, if committed outside Canada, an offence under this Act or the regulations and may be tried and punished in Canada. 1976-77, c. 52, s. 101.

### ***VENUE — Where commission outside Canada.***

101. (1) Any proceedings in respect of an offence under this Act may be instituted, tried and determined at the place in Canada where the offence was committed or at the place in Canada where the person charged with the offence is or has an office or place of business at the time of the institution of such proceedings.

(2) Any proceedings in respect of an offence under this Act that is committed outside Canada may be instituted, tried and determined at any place in Canada. 1976-77, c. 52, s. 102.

**ENFORCEMENT OF BONDS — *Disposition of fines.***

102. (1) Where pursuant to any provision of this Act, other than section 92, a bond is required to be posted, the bond may be enforced in accordance with its terms in the Federal Court for the face value of the bond, which face value shall be deemed to be liquidated damages.

(2) All fines and forfeitures imposed or recovered under this Act belong to Her Majesty and form part of the Consolidated Revenue Fund. 1976-77, c. 52, s. 103.

***Subsection (1)***

*Canada (A.G.) v. Khimani* (1985), 50 O.R. (2d) 476 (Ont. Div. Ct.).

The Attorney General of Canada claimed \$2,000 plus interest owing under a performance bond given by the defendant under section 18(1) of the Act. The defendant entered into the performance bond on June 10, 1982 with the result that one, Yasmin Jetha, was permitted to enter Canada as a visitor. The bond guaranteed that the visitor would leave by August 9, 1982, but the visitor left September 22, 1982. The defendant admitted to being aware on August 9, 1982, that the failure of Yasmin Jetha to leave Canada was a breach of the bond. The trial judge refused to give judgment in favour of the plaintiff, Attorney General of Canada, and purported to exercise an equitable jurisdiction set out in section 78(3) of the Courts of Justice Act, S.O. 1984, c. 11. This decision was overturned, it being held that, whatever sympathy the Court may have had for the defendant (respondent), the finding that the terms and conditions of the bond had been breached meant that the Court must enforce payment of the bond.

**Examination of Approved Businesses and Funds*****MINISTER MAY CONDUCT EXAMINATION — Powers of examination — Inspection and copying of things seized.***

102.001 (1) The Minister may conduct an examination of any business or fund approved by the Minister in order to ensure that it is being operated, managed and promoted in accordance with this Act and the regulations.

(2) In conducting an examination, the Minister may

(a) inquire into the affairs of the business or fund, or of any person who manages, operates or promotes it, and examine

(i) any books, papers, documents, correspondence, electronic data, communications, negotiations, transactions, loans, borrowings or payments that relate to the business or fund,

(ii) any property or other assets that are at any time held or controlled by or on behalf of the business or fund,

(iii) any liabilities, debts, undertakings or obligations that exist, and any



financial or other conditions that prevail, at any time, in relation to the business or fund, and

(iv) any relationship that exists at any time between the business or fund and any person by reason of investments, commissions promised, secured or paid, interests held or acquired, the lending or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship;

(b) require the business or fund, or any person who operates, manages, promotes or audits it, to provide information and explanations, to the extent that they are reasonably able to do so, in respect of the business or fund or of any entity in which it has an investment;

(c) subject to section 102.002, at any reasonable time, enter and inspect any building, receptacle or place in which the Minister believes on reasonable grounds there is any thing referred to in paragraph (a); and

(d) seize any thing that the Minister believes on reasonable grounds will afford evidence in respect of the commission of an offence under this Act.

(3) Any thing seized under paragraph (2)(d) shall be made available for inspection or copying by the person from whom it was seized at a mutually convenient time and place if the person asks to inspect or copy it. 1992, c. 49, s. 88.

**WARRANT REQUIRED TO ENTER DWELLING-PLACE — Authority to issue warrant.**

102.002 (1) The Minister may not enter a dwelling-place for any of the purposes of section 102.001 except with the consent of the occupant or under the authority of a warrant.

(2) A justice of the peace who is satisfied by information on oath in the form set out as Form 1 in Part XXVIII of the *Criminal Code*, modified according to the circumstances,

(a) that the conditions for entry described in paragraph 102.001(2)(c) exist in relation to a dwelling-place,

(b) that entry to the dwelling-place is necessary for the conduct of an examination under section 102.001, and

(c) that entry to the dwelling-place has been refused or there are reasonable grounds to believe that entry will be refused,

may at any time issue a warrant under the justice's hand authorizing the Minister to enter the dwelling-place, subject to any conditions that may be specified in the warrant. 1992, c. 49, s. 88.

**RECORDS.**

102.003 Every person who operates, manages or promotes an approved business or fund shall ensure that all records that relate to transactions involving the business or fund are kept in Canada, including the original of all books, papers, documents and correspondence and copies of all electronic data and communications that relate to those transactions. 1992, c. 49, s. 88.

**Seizure and Forfeiture****SEIZURE OF VEHICLE — *Seizure of evidence — Notice of seizure of vehicle.***

102.01 (1) An immigration officer or a peace officer may, where the officer believes on reasonable grounds that a vehicle was used in any manner in connection with the commission of an offence under section 94.1, 94.2 or 94.4, seize the vehicle as forfeit.

(2) An immigration officer or a peace officer may, where the officer believes on reasonable grounds that an offence has been committed under section 94.1, 94.2 or 94.4, seize any thing that the officer believes on reasonable grounds will afford evidence in respect of the contravention.

(3) An immigration officer or a peace officer who seizes a vehicle under subsection (1) shall take such measures as are reasonable in the circumstances to give notice of the seizure to any person who the officer believes on reasonable grounds is entitled to make an application under section 102.2 in respect of the vehicle. R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1992, c. 49, s. 89.

**INFORMATION FOR SEARCH WARRANT — *Execution in another territorial jurisdiction — Seizure of things not specified — Form of search warrant — Where warrant not necessary — Exigent circumstances.***

102.02 (1) A justice of the peace who is satisfied by information on oath in the form set out as Form 1 in Part XXVIII of the *Criminal Code*, modified according to the circumstances, that there are reasonable grounds to believe that there may be found in a building, receptacle or place

(a) any vehicle that was used in any manner in connection with an offence under section 94.1, 94.2 or 94.4, or

(b) any thing that there are reasonable grounds to believe will afford evidence in respect of the commission of an offence under section 94.1, 94.2, 94.4 or 94.6.

may at any time issue a warrant under the justice's hand authorizing an immigration officer or peace officer to search the building, receptacle or place for any such vehicle or thing and to seize the vehicle or thing.

(2) A justice of the peace may, where a building, receptacle or place referred

to in subsection (1) is in a territorial division other than the one in which the justice of the peace has jurisdiction, issue a warrant in a form similar to the form referred to in subsection (1), modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in the manner set out in Form 28 of Part XXVIII of the *Criminal Code*, by a justice of the peace having jurisdiction in that territorial division.

(3) An immigration officer or a peace officer who executes a warrant issued under subsection (1) may seize, in addition to any vehicle or thing mentioned in the warrant,

(a) any vehicle that the officer believes on reasonable grounds was used in any manner in connection with the commission of an offence under section 94.1, 94.2 or 94.4; or

(b) any thing that the officer believes on reasonable grounds will afford evidence in respect of the commission of an offence under section 94.1, 94.2, 94.4 or 94.6.

(4) A warrant issued under subsection (1) may be in the form set out as Form 5 in Part XXVIII of the *Criminal Code*, modified according to the circumstances.

(5) An immigration officer or a peace officer may exercise any of the powers referred to in subsection (1) without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(6) For the purposes of subsection (5), “exigent circumstances” means circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in danger to human life or safety or the loss or destruction of any thing liable to seizure. R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1992, c. 49, s. 90.

#### **POWERS OF ENTRY.**

102.03 For the purpose of exercising the authority under section 102.02, an immigration officer or a peace officer may, with such assistance as the officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### **LIMITATION FOR SEIZURES.**

102.04 No seizure may be made under section 102.01 or 102.02 more than six years after the contravention or use in respect of which the seizure is made. R.S.C. 1985 (4th Supp.), c. 29, s. 11.



***CUSTODY OF THINGS SEIZED — Report where evidence seized — Return of evidence.***

102.05 (1) Any thing that is seized under section 102.01 or 102.02 shall forthwith be placed in the custody of a senior immigration officer.

(2) Where an immigration officer or a peace officer seizes any thing as evidence under section 102.01 or 102.02, the officer shall forthwith report the circumstances of the seizure to the Deputy Minister.

(3) Any thing that is seized under section 102.01 or 102.02 as evidence alone shall be returned forthwith on completion of all proceedings in which the thing seized may be required. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

***COPIES OF RECORDS, BOOKS, OR DOCUMENTS — Detention of records seized.***

102.06 (1) Where any record, book or document is examined or seized under this Act, the Minister, or the officer by whom the record, book or document is examined or seized, may make or cause to be made one or more copies thereof, and a copy of any such record, book or document purporting to be certified by the Minister or a person authorized by the Minister is admissible in evidence and has the same probative force as the original record, book or document would have if it had been proved in the ordinary way.

(2) No records, books or documents that have been seized as evidence under this Act shall be detained for a period of more than three months after the time of seizure, unless, before the expiration of that period,

- (a) the person from whom they were seized agrees to their further detention for a specified period of time;
- (b) a justice of the peace is satisfied on application that, having regard to the circumstances, their further detention for a specified period of time is warranted and the justice so orders; or
- (c) judicial proceedings are instituted in which the things seized may be required. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

***RETURN OF VEHICLE SEIZED.***

102.07 A senior immigration officer may, subject to this or any other Act of Parliament, return any vehicle that has been seized under section 102.01 or 102.02 to the person from whom it was seized or to any person authorized by the person from whom it was seized on receipt of

- (a) an amount of money of a value equal to
  - (i) the value of the vehicle at the time of the seizure, as determined by the Minister, or
  - (ii) such lesser amount as the Minister may direct; or

(b) where the Minister so authorizes, security satisfactory to the Minister. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### ***VEHICLES NO LONGER FORFEIT.***

102.08 Vehicles in respect of which money or security is received under section 102.07 shall cease to be forfeit from the time the money or security is received and the money or security shall be held as forfeit in lieu thereof. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### ***FORFEITURES ACCRUE AUTOMATICALLY FROM TIME OF CONTRAVENTION.***

102.09 Subject to the reviews and appeals established by this Act, any vehicle seized as forfeit under section 102.01 is forfeit from the time of the commission of an offence under section 94.1, 94.2 or 94.4 in respect of which the vehicle was seized and no act or proceeding subsequent to the commission of the offence is necessary to effect the forfeiture of the vehicle. R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1992, c. 49, s. 91.

#### ***REVIEW OF FORFEITURE.***

102.1 The forfeiture of any vehicle seized under section 102.01 or any money or security held as forfeit in lieu thereof is final and not subject to review or to being restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 102.12. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### ***REPORT TO DEPUTY MINISTER.***

102.11 Where a vehicle has been seized under section 102.01 or 102.02, the officer who seized the vehicle shall forthwith report the circumstances of the seizure to the Deputy Minister. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### ***REQUEST FOR MINISTER'S DECISION — Burden of proof.***

102.12 (1) Any person

- (a) from whom a vehicle is seized under section 102.01 or 102.02,
- (b) who owns a vehicle that is seized under section 102.01 or 102.02, or
- (c) from whom money or security is received pursuant to section 102.07 in respect of a vehicle seized under section 102.01 or 102.02,

may, within thirty days after the day of the seizure, request a decision of the Minister under section 102.14 by giving notice in writing to the Minister.

- (2) The burden of proof that notice was given under subsection (1) lies on

the person claiming to have given the notice. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

*NOTICE OF REASONS FOR SEIZURE — Evidence — Idem.*

102.13 (1) Where a decision of the Minister under section 102.14 is requested pursuant to section 102.12, the Deputy Minister shall forthwith serve on the person who requested the decision written notice of the reasons for the seizure in respect of which the decision is requested.

(2) The person on whom a notice is served under subsection (1) may, within thirty days after the notice is served, furnish such evidence in the matter as the person desires to furnish.

(3) Evidence may be given pursuant to subsection (2) by affidavit made before any justice of the peace, commissioner for taking oaths or notary public. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

*DECISION OF THE MINISTER — Notice of decision — Judicial review.*

102.14 (1) After the expiration of the thirty days referred to in subsection 102.13(2), the Minister shall, as soon as is reasonably possible, decide, in respect of the vehicle that was seized, whether the vehicle was used in connection with the commission of an offence under section 94.1, 94.2 or 94.4.

(2) The Minister shall, forthwith on making a decision under subsection (1), serve on the person who requested the decision written notice thereof.

(3) The decision of the Minister under subsection (1) is not subject to review or to being restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 102.17(1). R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1992, c. 49, s. 92.

*WHERE THERE IS NO OFFENCE COMMITTED.*

102.15 Subject to this or any other Act of Parliament, where the Minister decides, pursuant to section 102.14, that there has been no offence committed under section 94.1, 94.2 or 94.4 in respect of a vehicle or that the vehicle was not used in the manner described therein, the Minister shall forthwith authorize the removal from custody of the vehicle or the return of any money or security taken in respect thereof. R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1992, c. 49, s. 93.

*WHERE THERE IS CONTRAVENTION — Amount demanded in respect of a vehicle under paragraph (1)(b).*

102.16 (1) Where the Minister decides, pursuant to section 102.14, that the vehicle referred to in that section was used in the manner described therein,



the Minister may, subject to such terms and conditions as the Minister may determine,

(a) return the vehicle on receipt of an amount of money of a value equal to

(i) the value of the vehicle at the time of the seizure, as determined by the Minister, or

(ii) such lesser amount as the Minister may direct, or

(b) remit any portion of any money or security taken, and where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as the Minister considers sufficient, not exceeding an amount determined under subsection (2).

(2) The amount of money that the Minister may demand under paragraph (1)(b) in respect of a vehicle shall not exceed an amount equal to the value of the vehicle at the time of the seizure, as determined by the Minister. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### *FEDERAL COURT — Ordinary action.*

102.17 (1) A person who requests a decision of the Minister under section 102.14 may, within ninety days after being notified of the decision, appeal the decision by way of an action to the Federal Court — Trial Division in which that person is the plaintiff and the Minister is the defendant.

(2) The *Federal Court Act* and the *Federal Court Rules* applicable to ordinary actions apply in respect of actions instituted under subsection (1), except as varied by special rules made in respect of such actions. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### *RESTORATION OF VEHICLE OR THING PENDING.*

102.18 Where an appeal is taken by the Minister from any judgment that orders the Minister to give or return any thing that has been seized under section 102.01 or 102.02 to any person, the execution of the judgment shall not be suspended if the person to whom the vehicle or thing is ordered given or returned gives such security to the Minister as the court that rendered the judgment, or a judge thereof, considers sufficient to ensure delivery of the vehicle or thing or the full value thereof to the Minister if the judgment so appealed is reversed. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

#### *SERVICE OF NOTICES.*

102.19 The service of the Deputy Minister's notice under section 102.13 or the notice of the Minister's decision under section 102.14 is sufficient if it is

sent by registered mail addressed to the person on whom it is to be served at the person's latest known address. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

*CLAIMING INTEREST — Day of hearing — Notice — Service of notice — Order that interest not affected — Appeal — Return of vehicle — Limit on amount paid — Definitions — “Court of appeal” — “Judge”.*

102.2 (1) Where a vehicle is seized as forfeit under this Act, any person, other than the person in whose possession the vehicle was when seized, who claims an interest therein as owner, mortgagee, lien-holder or holder of any like interest may, within sixty days after the seizure, apply by notice in writing to a judge for an order under subsection (5).

(2) The judge to whom an application is made under subsection (1) shall fix a day for a hearing of the application not less than thirty days after the day of filing of the application.

(3) A person making an application under subsection (1) shall serve a notice of the application and of the hearing on the Minister not later than fifteen days after a day for the hearing of the application is fixed pursuant to subsection (2).

(4) The service of a notice under subsection (3) is sufficient if the notice is sent by registered mail addressed to the Minister.

(5) Where, on the hearing of an application made under subsection (1), it is made to appear to the satisfaction of the judge

(a) that the applicant acquired the interest in respect of which the applicant is applying in good faith prior to the contravention in respect of which the seizure was made,

(b) that the applicant is innocent of any complicity in the contravention that resulted in the seizure and of any collusion in relation to that contravention, and

(c) that the applicant exercised all reasonable care with respect to the person permitted to obtain possession of the vehicle to satisfy the applicant that the vehicle was not likely to be used in connection with the commission of an unlawful act or, in the case of a mortgagee or lien-holder, that the applicant exercised such care with respect to the mortgagor or lien-giver,

the applicant is entitled to an order declaring that the applicant's interest is not affected by the seizure and declaring the nature and event of the applicant's interest at the time of the contravention.

(6) A person who makes an application under subsection (1) or the Minister may appeal to the court of appeal from an order made under subsection (5) and the appeal shall be asserted, heard and decided according to the ordinary

procedure governing appeals to the court of appeal from orders or judgments of a judge.

(7) The Minister shall, on application made to the Minister by a person who has obtained a final order under this section,

(a) direct that the vehicle to which the interest of the person relates be returned to the person; or

(b) direct that an amount equal to the value of the interest of the person, as declared in the order, be paid to the person.

(8) The total amount paid under paragraph (7)(b) in respect of a vehicle shall, where the vehicle was sold or otherwise disposed of under this Act, not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the vehicle, and, where there are no proceeds of a disposition of a vehicle under this Act, no payment shall be made pursuant to paragraph (7)(b) in respect of the vehicle.

(9) In this section,

“court of appeal” means, in the province in which an order under this section is made, the court of appeal for that province as defined in the definition “court of appeal” in section 2 of the *Criminal Code*;

“judge” means

(a) in the Province of Quebec, a judge of the Superior Court for the district in which the vehicle, in respect of which an application for an order under this section is made, was seized,

(a.1) in the Province of Ontario, a judge of the Ontario Court (General Division),

(b) in the Provinces of Nova Scotia and British Columbia, a judge of the county or district court of the county or district in which the vehicle was seized,

(c) in the Provinces of Nova Scotia, British Columbia, Prince Edward Island and Newfoundland, a judge of the Supreme Court thereof,

(d) in the Provinces of New Brunswick, Manitoba, Alberta and Saskatchewan, a judge of the Court of Queen’s Bench thereof, and

(e) in the Yukon Territory and the Northwest Territories, a judge of the Supreme Court thereof. R.S.C. 1985 (4th Supp.), c. 29, s. 11; 1990, c. 16, s. 13; c. 17, s. 24; 1992, c. 51, s. 53.

(e) in the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court thereof. [1993, c. 28, s. 78 (Sched. III, item 72). Not in force at date of publication.]

## DISPOSAL.

102.21 A vehicle the forfeiture of which is final under this Act shall be



disposed of in such manner as the Minister may direct or be sold by public auction or public tender or by the Minister of Supply and Services pursuant to the *Surplus Crown Assets Act*, subject to such regulations as may be prescribed. R.S.C. 1985 (4th Supp.), c. 29, s. 11.

### Arrest and Detention

*WARRANT FOR ARREST — Arrest without warrant — Detention and release from detention by adjudicator — Detention and release from detention by senior immigration officer — Notification of detention for examination of inquiry — Release from detention by senior immigration officer — Review of decision for detention — Release from detention by adjudicator — Retaking into custody — Review in public — Confidentiality — Idem.*

103. (1) The Deputy Minister or a senior immigration officer may issue a warrant for the arrest and detention of any person with respect to whom an examination or inquiry is to be held or a removal order or conditional removal order has been made where, in the opinion of the Deputy Minister or that officer, there are reasonable grounds to believe that the person poses a danger to the public or would not appear for the examination or inquiry or for removal from Canada.

(2) Every peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, an order or a direction for arrest or detention, arrest and detain or arrest and make an order to detain

- (a) for an inquiry, or for a determination by a senior immigration officer under subsection 27(4), any person who on reasonable grounds is suspected of being a person referred to in paragraph 27(2)(b), (e), (f), (g) or (h), or
- (b) for removal from Canada, any person against whom a removal order has been made that is to be executed,

where, in the opinion of the officer, there are reasonable grounds to believe that the person poses a danger to the public or would not appear for the inquiry or the determination or for removal from Canada.

(3) Where an inquiry is to be held or is to be continued with respect to a person or a removal order or conditional removal order has been made against a person, an adjudicator may make an order for

- (a) the release from detention of the person, subject to such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond;
- (b) the detention of the person where, in the opinion of the adjudicator,

the person is likely to pose a danger to the public or is not likely to appear for the inquiry or its continuation or for removal from Canada; or

(c) the imposition of such terms and conditions as the adjudicator deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

(3.1) Where an exclusion order, a departure order or a conditional departure order has been made by a senior immigration officer against a person, a senior immigration officer may make an order

(a) for the release from detention of the person, subject to such terms and conditions as the senior immigration officer deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond;

(b) for the detention of the person where, in the opinion of the senior immigration officer, the person is likely to pose a danger to the public or is not likely to appear for removal from Canada; or

(c) imposing on the person such terms and conditions as the senior immigration officer deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

(4) Where any person is detained for an examination or inquiry pursuant to this section, the person who detains or orders the detention of that person shall forthwith notify a senior immigration officer of the detention and the reasons therefor.

(5) A senior immigration officer may, within forty-eight hours from the time when a person is placed in detention pursuant to this Act, order that the person be released from detention subject to such terms and conditions as the officer deems appropriate in the circumstances, including the payment of a security deposit or the posting of a performance bond.

(6) Where any person is detained pursuant to this Act for an examination, inquiry or removal and the examination, inquiry or removal does not take place within forty-eight hours after that person is first placed in detention, that person shall be brought before an adjudicator forthwith and the reasons for the continued detention shall be reviewed, and thereafter that person shall be brought before an adjudicator at least once during the seven days immediately following the expiration of the forty-eight hour period and thereafter at least once during each thirty-day period following each previous review, at which times the reasons for continued detention shall be reviewed.

(7) Where an adjudicator who conducts a review pursuant to subsection (6) is satisfied that the person in detention is not likely to pose a danger to the public and is likely to appear for an examination, inquiry or removal, the adjudicator shall order that the person be released from detention subject to such terms and conditions as the adjudicator deems appropriate in the

circumstances, including the payment of a security deposit or the posting of a performance bond.

(8) Where an adjudicator has ordered that a person be released from detention pursuant to paragraph (3)(a) or subsection (7) that adjudicator or any other adjudicator may at any time thereafter order that the person be retaken into custody and held in detention if the adjudicator becomes satisfied that the person is likely to pose a danger to the public or is not likely to appear for an examination, inquiry or removal.

(9) Subject to subsections (10) and (11) and to any rules of the place where a person is detained, a review under subsection (6) of the reasons for the person's continued detention shall be conducted in public.

(10) An adjudicator who is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of a review of the reasons for a person's continued detention being held in public may, on application therefor, take such measures and make such order as the adjudicator considers necessary to ensure the confidentiality of the review.

(11) An adjudicator who considers it appropriate to do so may take such measures and make such order as the adjudicator considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (10). 1976-77, c. 52, s. 104; R.S.C. 1985 (4th Supp.), c. 28, s. 27; 1992, c. 49, s. 94.

### *Subsection (1)*

*Re Douglas* (1981), 5 W.C.B. 354 (Ont. H.C.).

A detention order issued under section 104(1) signed by an immigration officer in a space designated "authorized officer and title" is valid on its face.

### *Subsection (2)*

*Rios v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 632, 11 Imm. L.R. (2d) 122, 115 N.R. 394 (C.A.).

This case raises the question of what is meant by the word "elude" in section 27(2) of the Immigration Act. The majority concluded that the word "elude" has the connotation either of artifice or surreptitiousness or of the intention to repudiate the obligation or escape the effect of the law in a general way. In the context of this case it would mean, not being present at a particular inquiry, and having the intention of not complying with the obligation of the law. Failure to attend at an examination raises a *prima facie* case under section 27(2)(f) such that an immigration officer could believe that the person in question eluded examination or inquiry and appropriate enforcement action taken. The person concerned would be able, however, to have his or her case subsequently adjudicated upon in relation to his or her real intentions and this did not happen in this case. This will not render administration of the Act difficult. Accordingly the majority



ruled that the section 28 application to set aside the deportation order issued against the applicant should succeed. The minority agreed that a person does not elude an inquiry within the meaning of section 27(2)(f) if that person has reasonable grounds for believing that he has good cause for not appearing at the inquiry.

*Khan v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 107, 30 F.T.R. 161, [1990] 1 F.C. 30 (Fed. T.D.).

The applicant entered Canada as a foreign domestic and obtained employment with an employer other than the one specified in the employment authorization. In fact, she misrepresented her true employer to the immigration authorities. The question was whether the immigration officers were justified in arresting the appellant instead of writing and forwarding a report of the matter to the Deputy Minister. The reason for arresting the applicant without warrant disappeared upon the making of a phone call to her sister. The applicant was 8 months pregnant and, therefore, not a danger to the public. One of the officers deposed in his affidavit that, having ascertained her true place of employment and residence, he decided that it would not be necessary to detain her until the inquiry. If the applicant was held in detention pursuant to section 103, such detention endured for only about 2 hours. In effect, there is a "dis-arrest" provision which resides in section 103(5) of the Act. If this takes place, the applicant is no longer held in detention pursuant to section 28. This has the effect of requiring the officers to comply with the provisions of section 27(2) and forward a written report to the Deputy Ministry setting out the details of the case. In the result, the inquiry which had been instituted pursuant to section 28 was quashed.

*R. v. Kwok* (1986), 18 O.A.C. 38 (Ont. C.A.).

Although decided on the admittedly unique situation existing at a port-of-entry, this decision may have some application by analogy in the type of situation envisioned by this section. The appellant arrived at Pearson International Airport aboard a flight originating in London. He was examined by a senior immigration officer and detained pending an immigration inquiry. The immigration officer who interviewed the appellant had doubts as to the *bona fides* of the appellant as a genuine visitor and wrote a report pursuant to section 20 of the Act for the benefit of the acting senior immigration officer. A person is not detained within the meaning of section 10 of the Charter of Rights and Freedoms until the restriction on his freedom has gone beyond that required for the processing of his application for entry. The fact that some questioning preceded the advice required by section 10 did not by itself offend the section. The obligation to inform a person of his rights under section 10(b) of the Charter is an obligation to inform, without delay, but that does not mean immediately. Further, the admission into evidence of a conversation preceding the section 10 warning did not bring the administration of justice into disrepute.

### *Subsection (3)*

*Ashoornia v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1465, March 22, 1994.

This was an application for judicial review of a credible basis hearing. The applicant was a citizen of Iran. She was arrested and detained on her arrival in Canada. When

arrested she was in possession of false documents. Prior to the credible basis hearing, the applicant attended at least two detention reviews. At the detention reviews the adjudicator continued the applicant's detention. He concluded that she should be detained because she had lied to enter Canada and had no friends or relatives in Canada and therefore no reason to remain here. The adjudicator's decision at the detention review was based in a large measure on the assessment of the applicant's credibility. The adjudicator, who had twice attended the detention reviews, also acted as the adjudicator at the credible basis hearing.

In the detention reviews the adjudicator had canvassed exactly the same evidence as he subsequently heard at the credible basis inquiry and had concluded that the applicant was not credible. In such a situation, a reasonable apprehension of bias was created by the adjudicator's presence at the credible basis hearing and the application for judicial review was allowed.

*Editor's Note:* Although the refugee determination provisions have been changed, the principle in this case may be of broader import.

*Pursley v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 211, 29 F.T.R. 204 (C.A.).

The applicant entered Canada on April 22, 1989 and was arrested pursuant to section 103 of the Immigration Act. An adjudicator refused to release the applicant pending his inquiry. If the detaining authority or the adjudicator refused the legal duty to hold a bail hearing or give proper consideration to an application for bail, the trial division would entertain an application to compel the performance of those duties.

In this particular case, the adjudicator having refused to grant bail after a hearing, the trial division had no further jurisdiction and the application to quash the adjudicator's decision was dismissed.

*Webb v. British Columbia* (1988), 4 W.C.B. (2d) 175.

Section 104 of the Immigration Act does not contravene the provision in section 9 of the Charter of Rights against arbitrary detention. The legislation requires reasons for the opinion that the accused should be detained and provides for regular reviews of that decision.

*Mavour v. Min. of Employment & Immigration*, [1984] 2 F.C. 122 (Fed. C.A.).

The applicant was arrested on March 15, 1983. An inquiry was caused to be held on March 22, 1983. On that day the inquiry was adjourned to March 30, 1983. The applicant was detained throughout this period, not only in respect of the immigration proceedings but also in respect of outstanding criminal charges. On March 30, 1983, the inquiry was not resumed because there was no case presenting officer available. The inquiry was resumed on April 6, 1983. The adjudicator did not lose jurisdiction by her failure to resume the inquiry on March 30, 1983, the date to which it had been adjourned. Further, the adjudicator's "offer" to release the applicant from detention that was to expire on April 12, 1983, at 4:00 p.m. was, in effect, a decision to release the applicant subject to the condition, among others, that the necessary security or cash deposit be made before a certain time. This was a condition which was within the authority of the adjudicator to impose under section 104(3) of the Act.

**Subsection (5)**

*Khan v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 107, 30 F.T.R. 161, [1990] 1 F.C. 30 (Fed. T.D.).

For digest, see section 103, subheading *Subsection (2)*, *supra*.

**Subsection (6)**

*Reza v. Canada* (1994), 18 O.R. (3d) 640 (S.C.C.).

This was an appeal from a decision of the Ontario Court of Appeal setting aside an order made by a motions judge staying the respondent's application for a declaration that certain provisions of the Immigration Act infringed the Charter of Rights. The issue on appeal was whether there was any basis for the Court of Appeal's interference with the motion judge.

The respondent came to Canada from Iran and claimed refugee status. It was found that there was no credible basis for referring his claim to the Immigration and Refugee Board and a deportation order was issued. Leave to commence a judicial review application was refused. The respondent's case was reviewed on humanitarian and compassionate grounds a number of times. After the last refusal the respondent unsuccessfully sought leave to commence an application for judicial review. The respondent subsequently brought an application in Ontario for a declaration that certain sections of the Immigration Act infringed his Charter rights. The respondent also brought a motion at the same time for an interlocutory injunction restraining the Minister from removing him. The appellant Minister took the position before the Ontario Court (General Division) that the Court should decline to exercise its jurisdiction on the ground that it was more appropriate for a Constitutional challenge to sections of the Immigration Act to be heard in the Federal Court.

In March, 1992 a motions judge granted the Minister's motion and stayed the respondent's application for declaratory and injunctive relief. The deportation order, however, was stayed by Galligan J.A. pending disposition of the respondent Reza's appeal to the Ontario Court of Appeal. In October, 1992 the Court of Appeal allowed the respondent Reza's appeal and ordered that the decision of the motions judge be set aside.

The Supreme Court of Canada allowed the Minister's appeal and was generally in agreement with the dissenting decision in the Court of Appeal of Ontario. The Supreme Court of Canada agreed that there was no basis for interfering with the motions court judge's decision to stay the proceedings. The Ontario Court and the Federal Court had concurrent jurisdiction to hear the respondent's application. Pursuant to section 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43, any judge of the General Division has a discretion to stay proceedings. The motions court judge properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum. The Court was of the view that this was the correct approach. The motions court judge took into account all relevant considerations in exercising his discretion to grant a stay and there was no basis for an appellate court to interfere with his decision. The appeal was allowed and the decision of the motions judge restored.



*Bembenek v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 229, 69 C.C.C. (3d) 34 (Ont. Gen. Div.).

*Habeas corpus* is a two-step procedure. The first step, the granting of the writ of *habeas corpus ad subjiciendum*, brings the prisoner before the court. The task of the court on the return of that writ is to determine whether or not the prisoner is detained according to regular process of law. Usually the two *habeas corpus* steps are heard together.

In immigration matters the Ontario court almost always declines to grant *habeas corpus* because the Federal Court is ordinarily a better forum in which to challenge immigration proceedings. It is only in unusual cases that the court enters upon the consideration of the availability of *habeas corpus* in immigration matters.

In order to prove that the immigration proceedings are a disguised form of extradition, the applicant has to establish that the Canadian immigration officials when they sought deportation acted in bad faith without a legitimate Canadian immigration objective.

Before the judgment of the Supreme Court of Canada in *R. v. Gamble* (1988), 45 C.C.C. (3d) 204, it was firmly established that the applicant had to be in some form of detention before the writ was available and that a person who was on bail at the time of the application cannot avail himself of the writ. The *Gamble* case, however, implied that *habeas corpus* is now available whenever any liberty interest protected by section 7 of the Charter is infringed.

The applicant in this case was in custody on the extradition proceedings. Although those proceedings were separate from the immigration proceedings they both involved the fact that the applicant was an escaped convict subject to a life sentence for murder. Further, the surety in the immigration matter rendered the applicant back into custody and in that sense the applicant was deprived of her liberty on the immigration matter. Even if the applicant were still free on the immigration release order she would still be subject to potential retaking under section 103(8), and a Minister's appeal or application to review the release order represented a very strong potential threat to the liberty of the applicant in the immigration proceedings. The potential for retaking and the appeal or review of the release order standing alone might not have represented a sufficient deprivation of liberty to justify an application for *habeas corpus*, but they did not stand alone in this case. The applicant was physically in custody on a matter flowing in part from the same factual substratum as the proceeding challenged in this application. Because her surety had withdrawn, the immigration proceedings represented a significant additional hurdle to the applicant's liberty. All of these facts taken together represented a deprivation of the applicant's liberty interest secured by section 7.

The Court of Appeal has stated unequivocally in *Peiroo v. Canada (Min. of Employment & Immigration)* (1989), 69 O.R. (2d) 253 at 261-262 that this Court in immigration proceedings should ordinarily exercise its discretion to refuse to hear *habeas corpus* applications because there are more appropriate and effective alternative remedies under the Immigration Act.

In this case, however, there was a multiplicity of pending and potential proceedings. A significant delay would have resulted had the Court declined to exercise its jurisdiction. Whatever the merits of the applicant's argument, a final determination on the merits would have been delayed greatly had the Court declined its jurisdiction. Given the urgent need for final determination on the merits, the Court concluded that it would have brought the administration of justice into disrepute and produced even more delay and more multiplicity of proceedings had the Court declined its jurisdiction.

The real mischief of disguised extradition is the case where extradition fails because the evidence of foreign crime is too weak for extradition and deportation is sought to achieve indirectly what could not be achieved directly through extradition. Disguised extradition is typically established when the evidence is not strong enough for extradition and the authorities of both countries collude and use deportation to achieve the removal of the person concerned to the requesting state. The applicant had not established in this case that the case for extradition was so weak that the authorities decided to launch immigration proceedings for the improper purpose of a groundless extradition.

In asserting that the immigration proceedings were nevertheless a disguised form of extradition the applicant was forced to bear a heavy burden of showing bad faith. The applicant was required to show the immigration proceedings were a sham. It is a legitimate Canadian immigration objective to deport convicted criminals in order to prevent Canada from becoming a haven for such persons. Thus, deportation is a legitimate process open to the government to achieve this policy objective. If there is a good faith basis to seek deportation then it takes very strong evidence to show that there is some disguised reason for immigration officials doing what it is ordinarily their duty to do.

In testing the question of bad faith it is necessary to decide first whether there is an apparently legitimate reason for immigration officials seeking deportation, and secondly what would be gained from deportation rather than extradition.

The mere presence in Canada of an escaped American convict under life sentence for murder provides an obviously legitimate reason for deportation. There was no evidence that anyone gained speed by seeking deportation instead of extradition. An examination of the evidence did not establish that the Canadian immigration proceedings were a sham and a disguised form of extradition with no legitimate Canadian immigration purpose, nor did it establish that the respondent Minister's officials were acting in bad faith. Accordingly, the application for *habeas corpus* was dismissed.

*Vega v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 160 (Ont. H.C.).

The applicant was granted visitor's status upon his admission to Canada. He received no extensions of his status and remained in Canada after the expiry of that status. Ultimately, the applicant was arrested by police when he went to report the loss of his passport and other vital documents. The applicant was denied release pending his inquiry and applied for *habeas corpus*. The Court accepted that it had jurisdiction to issue *Writ of Habeas Corpus* and to order the release of the applicant in the appropriate circumstances. The Court denied the relief on the basis that a person who could show reasonable and probable grounds for complaining about his detention under the Habeas Corpus Act could also proceed under section 82.1 of the Immigration Act.

*Noor v. Canada (Min. of Employment & Immigration)* (1990), 70 D.L.R. (4th) 248 (Que. C.A.).

This case deals with the Quebec Court of Appeal's description of the availability of the remedy of *habeas corpus* in the province of Quebec with respect to immigration proceedings. The Supreme Court has jurisdiction to deal with an application for *habeas corpus* and *certiorari* in aid, even if the Federal Court had jurisdiction under section 82.1 of the Immigration Act to review the decision of the adjudicator and the member of the Refugee Division with respect to the issue of a credible basis for claiming refugee

status. A provincial Supreme Court has the authority to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention authorized by a federal board. *Certiorari* in aid of *habeas corpus* is prudent to ensure the widest possible scope for review. *Habeas corpus* is available to challenge an unlawful deprivation of liberty. Further, the continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus*, if it becomes unlawful. *Habeas corpus* is not now and never has been a static, narrow, formalistic remedy. Its scope has grown to achieve the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. Expelling a person from Canada illegally and against his will is a deprivation of liberty. In the context of this case, the Supreme Court had jurisdiction to hear the application, to examine not only the detention order, but also the validity of the order first made by the adjudicator with respect to the credible basis for the refugee claim, as this decision was in fact the reason for the expulsion order although the review goes only to the exercise of jurisdiction and not the correctness of the decision.

The Court reviewed the record and concluded that the first level panel had satisfied the obligation to permit the refugee claimant to present evidence and cross-examine witnesses and make representations and the application for *habeas corpus* was dismissed.

*Peiroo v. Canada (Min. of Employment & Immigration)* (1989), 69 O.R. (2d) 253, 38 Admin. L.R. 247, 8 Imm. L.R. (2d) 89, 60 D.L.R. (4th) 574, 34 O.A.C. 43 (Ont. C.A.).

The applicant for *habeas corpus* failed to show that the available review and appeal process established by Parliament under the Immigration Act was inappropriate or less advantageous than the *habeas corpus* jurisdiction of the Supreme Court. Accordingly, the Court dismissed the *habeas corpus* application noting that the relief sought was clearly within the purview of the statutory review and appeal process set out by the Immigration Act.

Both jurisprudence and logic suggest that review of immigration matters should be left with the Federal Court of Canada which has review and appeal jurisdiction with respect to many aspects of immigration law and which has geographical jurisdiction throughout Canada.

*Webb v. British Columbia* (1988), 4 W.C.B. (2d) 175.

Section 104 of the Immigration Act does not contravene the provision in section 9 of the Charter of Rights against arbitrary detention. The legislation requires reasons for the opinion that the accused should be detained and provides for regular reviews of that decision.

*R. v. Cushnie* (1988), 4 W.C.B. (2d) 377.

The accused applied to the Quebec Superior Court for *habeas corpus* with *certiorari* in aid. The accused had received a sentence of imprisonment for a conviction in Canada and had now served that sentence. He was being detained pursuant to a deportation order made shortly after his conviction. The accused had not yet been deported because the immigration authorities had been unsuccessful in obtaining a birth certificate showing that he had been born in the United States, to which country he was to be deported. The American authorities had been aware of the accused's presence in Canada for a significant period of time, but had not made any attempt to extradite him on outstanding American charges. The Court was entitled to review the orders of an adjudicator under



the Immigration Act pursuant to the *certiorari* proceedings to determine if there had been an error in continually renewing the detention order.

The accused's prior convictions in the United States were insufficient to justify a conclusion that the accused was a danger to the public. Further, there was no evidence upon which it could be concluded that the accused would seek to avoid removal from Canada. The continued incarceration of the accused constituted cruel and unusual treatment in violation of section 12 of the Charter of Rights. Accordingly, the accused was ordered released. Appeal to the Quebec Court of Appeal was dismissed (1989), 54 D.L.R. (4th) 420.

*Southam Inc. v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-1588-87, July 17, 1987.

The adjudicators were prohibited from conducting detention review hearings in the absence of the applicants unless the applicants' right-of-access was outweighed or limited in any given case by counter-balancing rights or interests. Further, if any objections to the public's access were raised, the applicants were to be given an opportunity to present submissions on the point.

*Chan v. R.* (1985), 54 Nfld. & P.E.I. R. 348 (P.E.I. S.C.).

The applicant was apprehended as being a person referred to in section 27(2) and was detained by an order issued pursuant to section 104(2) pending inquiry. The inquiry was held, the applicant claimed refugee status, the refugee claim was refused and the applicant appealed to the Immigration Appeal Board. He then brought this application in *habeas corpus* to inquire into the legality of his detention. Weekly reviews of the applicant's detention were held pursuant to section 104(6). Due to section 18 of the Federal Court Act, the Supreme Court had no jurisdiction in *certiorari* as it applied to any person reportedly exercising jurisdiction under the Immigration Act. The only jurisdiction in the Supreme Court was to review the legality of the applicant's detention through the medium of *habeas corpus*. Without *certiorari* in aid of *habeas corpus*, the Court was only able to examine the warrant of committal and to find if the warrant was regular on its face. The warrant of committal issued under section 104 of the Immigration Act was regular on its face and, therefore, the application in *habeas corpus* to inquire into the legality of the applicant's detention was refused.

*Mavour v. Min. of Employment & Immigration*, [1984] 2 F.C. 122 (Fed. C.A.).

For digest, see section 103, subheading *Subsection (3), supra*.

*Bauer v. Can. Immigration Comm.*, Fed. T.D., Doc. No. T-125-84, February 28, 1984.

There is no enforceable duty under the Immigration Act, the Common Law or the Canadian Charter of Rights and Freedoms to provide a reporter, when requested at a detention review hearing, unless the refusal is so tainted with unfairness as to require intervention by judicial review.

*Bauer v. Can. Immigration Comm.*, *supra*.

There is no mandatory duty on an adjudicator to permit the attendance of persons other than the applicant at detention review proceedings. The Court did not say that a detainee had no right at all to call evidence or witnesses.

*Bauer v. Can. Immigration Comm., supra.*

There is no procedure in the Immigration Act or regulations requiring the production of summaries prepared by immigration officials at detention review proceedings.

*Brannson v. Min. of Employment & Immigration* (1980), 5 W.C.B. 408 (Ont. H.C.).

Failure to comply with section 104(6) constitutes a breach of the statutory duty; it did not, however, result in any loss of jurisdiction.

*Re Rojas and R.* (1978), 20 O.R. (2d) 590 (Ont. C.A.).

Imprisonment was held to be justified since the objective of deportation was not sufficiently unlikely or illusory to require the Provincial Court to release the applicant. The applicant had entered the country illegally and the authorities had made *bona fide* efforts to effect his deportation; therefore, his detention had not ceased to be lawful.

*Re Pereira and Min. of Manpower & Immigration* (1976), 14 O.R. (2d) 355 (Ont. C.A.).

The Ontario Court of Appeal held that the jurisdiction of Provincial Superior Courts to review decisions of federal tribunals by way of *certiorari* and other extraordinary remedies was removed to the Federal Court by sections 18 and 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10. Those sections did not involve applications for *habeas corpus* with respect to federal tribunals and such applications, therefore, remained within the jurisdiction of the Provincial Superior Courts.

### Subsection (8)

*Singh v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-749-86, October 29, 1987.

The adjudicator ordered the release of the applicant who had made a refugee claim at an inquiry. The adjudicator also ordered the Commission to take the applicant back into custody if he was found not to be a convention refugee. Section 104(8) was found not to justify this type of order. That subsection contemplates a retaking into custody at a later point in time only after the circumstances have changed to the point where the retaking into custody has been justified.

**DETENTION — Additional period of detention — Minister may amend certificate — Review every seven days — Continued detention if efforts being made — Review in camera — Review is ex parte — Application to have order quashed — Application of order — Appropriate order — Idem — Idem — Application notwithstanding section 23 or 103 — Right to counsel.**

103.1. (1) Where, with respect to a person seeking to come into Canada,

(a) the person is unable to satisfy an immigration officer with respect to that person's identity, or

(b) in the opinion of the Deputy Minister or a person designated by the Deputy

Minister, there is reason to suspect that the person may be a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l),

an immigration officer shall detain the person and forthwith report the detention to a senior immigration officer who may continue or order the continuation of the detention for a period not exceeding seven days from the time the person was first detained under this Act.

(2) Where, with respect to a person detained under subsection (1), the Minister certifies in writing

(a) that

(i) the person's identity has not been established, or

(ii) the Minister has reason to suspect that the person may be a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l), and

(b) that an additional period of detention is required to investigate the matter referred to in subparagraph (a)(i) or (ii),

the person shall be brought before an adjudicator forthwith and at least once during every seven-day period thereafter, at which times the adjudicator shall review the reasons for the person's continued detention.

(3) Where the Minister has issued a certificate under subsection (2), the Minister may amend the certificate to which the detention relates to include any matter referred to in subparagraph (2)(a)(i) or (ii), following which the person shall be brought before an adjudicator forthwith and at least once during every seven-day period thereafter, at which times the adjudicator shall review the reasons for the person's continued detention.

(4) Where a person is detained under subsection (1) and the Minister has not issued a certificate under subsection (2), the person shall be brought before an adjudicator forthwith after the expiration of the period during which the person is being detained and that person shall be brought before an adjudicator at least once during every seven-day period thereafter, at which times the reasons for continued detention shall be reviewed.

(5) Where an adjudicator who conducts a review under subsection (2) or (3) is satisfied that reasonable efforts are being made by the Minister to investigate the matter referred to in subparagraph (2)(a)(i) or (ii), the adjudicator shall continue the person's detention.

(6) Every review under subsection (2) or (3) of the detention of a person suspected of being a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) shall be conducted *in camera*.



**(7) Where**

- (a) the Minister is of the opinion that any evidence or information to be presented by or on behalf of the Minister at any review under subsection (2) or (3) of the detention of a person referred to in subsection (6) should not be disclosed on the grounds that its disclosure would be injurious to national security or to the safety of persons, and
- (b) a request therefor is made by the Minister,

the adjudicator shall order that the review or any part thereof be conducted in the absence of the person and any counsel representing the person.

(8) Any person excluded by an order under subsection (7) from the whole or any part of the review under subsection (2) or (3) may apply to the Chief Justice of the Federal Court or to a judge of that Court designated by the Chief Justice for the purposes of this subsection to have the order quashed and sections 37 and 38 of the *Canada Evidence Act* shall apply, with such modifications as the circumstances may require, to such applications.

(9) Unless quashed, an order under subsection (7) shall, with respect to the person to whom the order relates, apply to every review under subsection (2) or (3), or part thereof, at which the Minister is of the opinion that any evidence or information to be presented by or on behalf of the Minister at the review, or part thereof, should not be disclosed on the grounds that its disclosure would be injurious to national security or to the safety of persons.

(10) Where the adjudicator who conducts a review under subsection (2) or (3) does not continue a person's detention under subsection (5), the adjudicator shall make the appropriate order under subsection 103(3).

(11) An adjudicator who conducts a review under subsection (4) shall make the appropriate order under subsection 103(3).

(12) Where, with respect to a person under detention under this section, the Minister is of the opinion

- (a) that the person's identity has been established, and
- (b) that the person is not a person described in paragraph 19(1)(e), (f), (g), (j), (k) or (l),

a senior immigration officer shall forthwith bring the person before an adjudicator who shall make the appropriate order under subsection 103(3).

(13) This section applies notwithstanding section 23 or 103.

(14) Every person detained under this section shall be informed that the person has the right to retain and instruct counsel and shall be given a reasonable opportunity to obtain such counsel. R.S.C. 1985 (4th Supp.), c. 28, s. 27; c. 29, s. 12; 1992, c. 1, s. 77; 1992, c. 49, s. 95.

***FAILURE TO COMPLY.***

104. Where a person fails to comply with any of the terms or conditions imposed under paragraph 103(3)(c) or with any of the terms or conditions subject to which he is released from detention under any provision of this Act

(a) any security deposit that may have been made either pursuant to paragraph 103(3)(c) or as a condition of the person's release may be declared forfeited by the Minister, or

(b) the terms of any performance bond that may have been posted may be enforced

and, where the person has been released from detention, he may be retaken into custody forthwith and held in detention. 1976-77, c. 52, s. 105; 1980-81-82-83, c. 47, s. 23.

***PERSON IN INSTITUTION.***

105. Where a warrant has been issued or an order has been made pursuant to subsection 103(1) or (3) with respect to any person who has become an inmate of any institution pursuant to the order of any court or other body, the Deputy Minister may issue an order to the warden, governor or other person in charge thereof directing him, at the expiration of the sentence or term of confinement to which the person is subject or at the expiration of the sentence or term of confinement as reduced by the operation of any statute or other law or by an act of clemency, to detain the person and deliver him to an immigration officer to take into custody. 1976-77, c. 52, s. 106.

***AUTHORITY TO EXECUTE WARRANTS AND ORDERS.***

106. Any warrant issued or order made under paragraph 12(3)(b), subsection 20(1), paragraph 23(3)(a), subsection 40.1(2), 90(2), 103(1), (2), (3) or (8) or 103.1(1) or section 105 is, notwithstanding any other law, sufficient authority to the person to whom it is addressed or who may receive and execute it to arrest and detain the person with respect to whom the warrant or order was issued or made. 1976-77, c. 52, s. 107; R.S.C. 1985 (4th Supp.), c. 29, s. 13; 1992, c. 49, s. 96.

***PLACE OF DETENTION.***

107. Where a person is detained pursuant to this Act, that person shall be detained at an immigrant station or other place satisfactory to the Deputy Minister. 1976-77, c. 52, s. 108.

### Injunctions

#### *INJUNCTIONS RELATING TO APPROVED BUSINESSES OR FUNDS — NOTICE.*

107.1 (1) Where, on application by the Minister to the Federal Court — Trial Division, it appears likely to the Court that a person who has obtained the approval of the Minister for a business or fund has done or failed to do anything, or is about to do anything, in contravention of any term or condition governing the approval, the Court may issue an injunction ordering any person named in the application

- (a) to refrain from doing anything that it appears to the Court may be in contravention of any term or condition governing the approval; or
- (b) to do anything that it appears to the Court may ensure compliance with any term or condition governing the approval.

(2) No injunction shall issue under subsection (1) unless forty-eight hours notice is given to each person named in the application or the urgency of the situation is such that service of notice would not be consistent with the purposes of this Act. 1992, c. 49, s. 97.

### PART VII GENERAL

#### Consultations and Agreements with Provinces

##### *CONSULTATIONS WITH PROVINCES — Federal-provincial agreements.*

108. (1) The Minister shall consult with the provinces respecting the measures to be undertaken to facilitate the adaptation of permanent residents to Canadian society and the pattern of immigrant settlement in Canada in relation to regional demographic requirements.

(2) The Minister, with the approval of the Governor in Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs. 1976-77, c. 52, s. 109.

#### International Agreements

##### *INTERNATIONAL AGREEMENTS.*

108.1 The Minister, with the approval of the Governor in Council, may enter into agreements with other countries for the purpose of facilitating the coordination and implementation of immigration policies and programs including, without restricting the generality of the foregoing, agreements for sharing



the responsibility for examining refugee claims and for sharing information concerning persons who travel between countries that are parties to such agreements. 1992, c. 49, s. 98.

### Immigration Officers

#### *APPOINTMENT OF IMMIGRATION OFFICERS — Designation of immigration officers.*

109. (1) Immigration officers shall be appointed or employed under the *Public Service Employment Act*.

(2) Notwithstanding subsection (1), the Minister may designate any person or class of persons as immigration officers for the purposes of this Act and that person or class of persons shall have such of the powers, duties and functions of an immigration officer as are specified by the Minister. 1976-77, c. 52, s. 110.

#### *AUTHORITY OF IMMIGRATION OFFICERS — Identification and seizures of documents — Fingerprints to be destroyed — Temporary assistants.*

110. (1) An immigration officer has the authority and powers of a peace officer to enforce any provision of this Act, the regulations or any warrant, order or direction made under this Act or the regulations respecting the arrest, detention or removal from Canada of any person.

(2) An immigration officer may

(a) require the following persons to comply with the regulations providing for their identification, namely,

- (i) persons who seek admission,
- (ii) persons who make an application pursuant to subsection 9(1), section 10, subsection 10.2(1) or section 16,
- (iii) persons who are arrested pursuant to section 103,
- (iv) person against whom a removal order or conditional removal order has been made, and
- (v) persons who claim to be Convention refugees;

(a.1) search persons seeking to come into Canada who the immigration officer believes on reasonable grounds have not revealed their identity or who have hidden on or about their person documents that are relevant to their admissibility and may search any vehicle that conveyed the persons to Canada and their luggage and personal effects;

(a.2) search persons seeking to come into Canada who the immigration officer believes on reasonable grounds have committed, or who are in possession of documents that may be used in the commission of, an offence

under section 94.1, 94.2 or 94.4 may search any vehicle that conveyed the persons to Canada and their luggage and personal effects;

(b) seize and hold at a port of entry or in Canada any travel or other documents that may be used for the purpose of determining whether a person may be granted admission or may come into Canada where the immigration officer believes on reasonable grounds that that action is required to facilitate the carrying out of any provision of this Act or the regulations; and

(c) seize and hold any travel or other documents if the immigration officer believes on reasonable grounds that they have been fraudulently or improperly obtained or used or that action is necessary to prevent the fraudulent or improper use.

(2.1) Subject to section 6 of the *Privacy Act*, any fingerprints that were taken pursuant to regulations made pursuant to paragraph 114(1)(o) of a person who is subsequently determined under this Act to be a Convention Refugee shall be destroyed when the person becomes a Canadian citizen.

(3) An immigration officer may, in cases of emergency, employ such temporary assistants as the officer deems necessary to enable him to carry out his duties under this Act and the regulations and those temporary assistants shall, during their employment, have the authority and powers referred to in subsection (1), but no such employment shall continue for a period exceeding forty-eight hours unless approved by the Minister. 1976-77, c. 52, s. 111; 1980-81-82-83, c. 47, s. 23; R.S.C. 1985 (4th Supp.), c. 28, s. 28; 1992, c. 49, s. 99.

### *Subsection (1)*

*R. v. Roye*, Fed. T.D., Doc. No. T-8647-82, April 2, 1984.

In this case the Minister successfully maintained an action against the defendant for assaulting two immigration officers acting within the scope of their authority and judgment was obtained in the amount of \$7,089 plus costs.

### *Subsection (2)*

*Gassmann v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 149, 36 F.T.R. 105 (Fed. T.D.).

Mandamus will compel the Minister to return a passport which the department turned over to a foreign government (the Federal Republic of Germany). The applicant entered Canada as a visitor and in the course of applying for an extension his passport was taken by the Immigration Authorities. The passport was not returned to the applicant but an interview was scheduled and ultimately the applicant was advised that the German government had cancelled or confiscated his passport. The Minister justified what was done under section 110(2)(c) of the Immigration Act. There was no evidence to suggest that the passport had been improperly obtained or used, or that action was necessary to prevent its fraudulent or improper use. Further, the Minister's officials did not tell

the applicant what they had done with his passport, namely, returned it to the government of the Federal Republic of Germany and did not allow him to make representations to them prior to taking the action that they contemplated. Accordingly, an order was issued directing the Minister to return the passport to the applicant.

*Nunes v. Canada (Min. of Employment & Immigration)*, [1987] 3 F.C. 112 (Fed. C.A.).

The search and seizure of documents under the Immigration Act can be made as part of the examination of persons seeking admission to Canada. This search and seizure was not contrary to the Charter of Rights. Thus, the two letters were admissible at an inquiry directed to whether the applicant was a true visitor to Canada. The adjudicator's decision, based on such letters, was upheld; the decision in *Mahtab v. Canada (Comm. de l'emploi & l'immigration)*, [1986] 3 F.C. 101 (Fed. T.D.) was expressly overruled.

### ***AUTHORITY FOR PERSONAL SEARCHES — Reasonable grounds for searches — Searches by same sex.***

**110.1 (1)** The search of a person under section 110 must be authorized by a senior immigration officer.

(2) Where a senior immigration officer considers that there are reasonable grounds for the search of a person under section 110, the senior immigration officer shall authorize the search.

(3) No person shall be searched under section 110 by a person who is not of the same sex, and if there is no immigration officer of the same sex at the place at which the search is to take place, an immigration officer may authorize any suitable person of the same sex to perform the search. 1992, c. 49, s. 100.

### ***OATHS AND EVIDENCE.***

**111.** Every immigration officer has the authority to administer oaths and to take and receive evidence under oath on any matter arising out of this Act. 1976-77, c. 52, s. 112.

**112.** [Repealed 1992, c. 49, s. 101.]

### **Peace Officers**

### ***DUTIES OF PEACE OFFICERS TO EXECUTE ORDERS.***

**113.** Every peace officer and every person in immediate charge or control of an immigrant station shall, when so directed by the Deputy Minister, an adjudicator, a senior immigration officer or an immigration officer, receive and execute any written warrant or order issued or made under this Act or the regulations for the arrest, detention or removal from Canada of any person. 1976-77, c. 52, s. 114.



### Regulations

*REGULATIONS — Exemptions from Regulations — Consent of province — Regulations do not apply — Idem — Regulations must be consistent with agreements — Renewal — Factors — Monitoring — Retroactive application of Regulations — Idem — Idem.*

**114. (1) The Governor in Council may make regulations**

(a) prescribing classes of immigrants and providing for the establishment, and the application to such classes, of selection standards based on such factors as family relationships, education, language, skill, occupational or business experience and other personal attributes and attainments, together with demographic considerations and labour market conditions in Canada, for the purpose of determining whether or not and the degree to which an immigrant will be able to become successfully established in Canada;

(a.1) specify classes of immigrants for the purposes of subsection 6(8) in respect of which the immigrant and any or all dependants shall be assessed;

(a.2) defining, for the purposes of this Act, what constitutes becoming successfully established in Canada;

(a.3) specifying, with respect to any prescribed class of immigrants, at what stage of assessing applications for visas all or part of the selection standards provided for under paragraph (a) shall be applied;

(a.4) prescribing a class of persons who may be granted landing on the basis of their business experience, accumulated net worth and intention to make investments in Canada that meet prescribed standards;

(a.5) authorizing the Minister to approve businesses and funds and requiring persons in the class prescribed pursuant to paragraph (a.4)

(i) to invest in businesses or funds approved by the Minister as fostering the development of a strong and viable economy and regional prosperity in Canada, and

(ii) to satisfy any selection standards established pursuant to paragraph (a);

(a.6) respecting the approval of businesses and funds under any regulations made under paragraph (a.5), including regulations

(i) prescribing terms and conditions governing their approval, including terms and conditions requiring provincial approval, and terms and conditions under which approval may be suspended, revoked or amended,

(ii) authorizing the Minister to impose additional terms and conditions in relation to any approval, and

(iii) authorizing the Minister to require any person who manages or controls an approved business or fund to submit periodic reports regarding compliance with the terms and conditions governing the approval;

(b) prescribing classes of immigrants in respect of which the number of immigrants who may be issued visas or granted landing in any calendar year shall be subject to a numerical limitation;

(b.1) specifying, with respect to any class of immigrants, that accompanying dependants shall not be included for the purposes of any number referred to in subsection 7(10);

(c) prescribing, for the purposes of subsection 6(2), classes of persons whose applications for landing may be sponsored by Canadian citizens and permanent residents;

(d) for the purposes of subsection 6(3),

(i) designating classes of persons and admission requirements in respect of any such class and specifying, with respect to any such class, at what stage of assessing applications for admission all or part of the admission requirements shall be applied, and

(ii) prescribing admission requirements for Convention refugees and specifying at what stage of assessing applications for admission all or part of the admission requirements shall be applied and whether the number of Convention refugees who may be issued a visa or be admitted into Canada in any calendar year shall be subject to a numerical limitation;

(d.1) respecting the sponsoring of persons for the purposes of subsection 6(4);

(e) prescribing, for the purposes of subsection 6(5), classes of immigrants and landing requirements in respect of immigrants and their dependants and specifying, with respect to any such class, at what stage of assessing applications for landing all or part of the landing requirements shall be applied;

(f) respecting the method of selecting immigrants, including regulations specifying, with respect to any prescribed class of immigrants, whether immigrants of that class, or immigrants of that class and any or all of their dependants, as the case may be, shall be selected

(i) on the basis of when their applications were made and duly completed in accordance with the regulations,

(ii) on a comparative basis, in relation to applications received during any specific period, to determine who will be best able to become successfully established in Canada, or

(iii) on any other basis;

(f.1) specifying, with respect to any prescribed class of immigrants the selection of which is on a comparative basis in relation to applications received during any specified period, whether the applications of immigrants who are not issued visas may be reconsidered on a comparative basis in relation to applications received during another period, or on any other basis;

(f.2) authorizing, with respect to any prescribed class of immigrants, visa

officers not to assess applications for visas where the Minister considers it necessary for the purpose of complying with the immigration plan currently in force;

(f.3) authorizing, with respect to Convention refugees and classes of persons prescribed for the purposes of subsection 6(3), immigration officers not to assess applications for visas or applications for admission where the Minister considers it necessary for the purposes of the immigration plan currently in force;

(f.4) authorizing, with respect to any prescribed class of immigrants, immigration officers not to assess applications for visas or applications for landing under subsection 6(5) where the Minister considers it necessary for the purpose of complying with the immigration plan currently in force;

(f.5) prescribing a date for the purposes of subsection 7(1);

(g) prescribing universities, colleges and other institutions not described in paragraph 10(a) for the taking of any academic, professional or vocational training course at which persons, other than Canadian citizens and permanent residents, may not be authorized to come into Canada and prescribing courses at any such university, college or other institution for the taking of which authorization may not be obtained under section 10;

(h) prescribing the circumstances in which a returning resident permit shall be issued to a permanent resident who makes an application pursuant to subsection 25(1);

(g.1) prescribing the period of validity of visas;

(h) prescribing the maximum duration of student and employment authorizations;

(h.1) prescribing the terms and conditions under which a document referred to in section 10.3 or subsection 70.1(1) may be issued, the maximum duration of any such document, which duration shall not be less than three years, and the circumstances in which the production of that document may be required;

(h.2) prescribing the maximum duration of grants of entry and of their extensions;

(h.3) prescribing criteria respecting the extension of the period during which visitors may remain in Canada pursuant to paragraph 17(2)(c); [1992, c. 49, s. 102. Not in force at date of publication.]

(i) specifying the documentation that may be required in respect of any class of visitors;

(j) prohibiting persons or classes of persons, other than Canadian citizens and permanent residents, from engaging or continuing in employment in Canada without authorization, prescribing the types of terms and conditions that may be imposed in connection with such an authorization and exempting any person or class of persons from the requirement to obtain such an authorization;

(j.1) prohibiting persons or classes of persons, other than Canadian citizens



- and permanent residents, from attending any university or college, or taking any academic, professional or vocational training course, in Canada without authorization, prescribing the types of terms and conditions that may be imposed in connection with such an authorization and exempting any person or class of persons from the requirement to obtain such an authorization;
- (j.2) prescribing classes of employment and specifying whether the number of employment authorizations, not including extensions, to be issued in respect of any such class in any calendar year will be subject to a numerical limitation;
- (j.3) authorizing, with respect to any prescribed class of employment, immigration officers not to assess applications for employment authorizations where the Minister considers it necessary for the purpose of complying with the immigration plan currently in force;
- (j.4) designating classes of persons for the purposes of subsection 12(1) who may be examined in a manner approved by the Minister instead of appearing before an immigration officer at a port of entry;
- (k) requiring any person to deposit security with the Minister to guarantee the performance by that person of any obligation assumed by that person with respect to the admission of any other person;
- (l) [Repealed 1992, c. 49, s. 102.]
- (m) prescribing the factors to be considered in determining whether, for medical reasons, any person is or is likely to be a danger to public health or to public safety;
- (m.1) prescribing social services for the purposes of subparagraph 19(1)(a)(ii);
- (m.2) prescribing classes of immigrants that shall be exempted from the application of subparagraph 19(1)(a)(ii); [1992, c. 49, s. 102. Not in force at date of publication.]
- (m.3) requiring or authorizing the interview of persons by visa officers for the purpose of assessing visa applications and applications for student and employment authorizations and respecting the places where such interviews may be conducted;
- (n) requiring or authorizing the examination of persons outside Canada for the purpose of determining whether those persons shall be allowed to come into Canada or may be granted admission;
- (o) requiring persons referred to in paragraph 110(2)(a) to provide photographs of themselves or to be fingerprinted or photographed or both;
- (p) prescribing the costs and expenses to be included in determining removal costs;
- (p.1) respecting the payment of fees for services provided in the administration of this Act and prescribing the amount of those fees;
- (p.2) prescribing classes of persons who are or are not members of a crew;
- (q) requiring transportation companies to ensure, in prescribed circumstances, that immigrants and visitors being carried to Canada by them are in possession of valid visas where required;

- (q.1) with respect to transportation companies bringing persons into Canada,
  - (i) requiring or authorizing those companies to hold the visas, passports or travel documents of those persons in order to ensure that the visas, passports or travel documents are available for examination by an immigration officer at the port of entry,
  - (ii) providing for the disposition by those companies, on the arrival of those persons in Canada, of any visas, passports or travel documents held by those companies, and
  - (iii) requiring those companies to furnish such documentary evidence for examination by an immigration officer at the port of entry as is necessary to establish the identity and itinerary for travel to Canada of those persons;
- (q.11) for determining the adequacy of any area, office, laboratory or other facility for the purposes mentioned in subsection 89(2);
- (q.12) designating, for the purposes of subsection 97.1(1) or (3), provisions of any regulation made under paragraph (q), (q.1), (t), (cc), (dd), (ee), (ff), (gg) or (hh);
- (q.2) [Repealed 1992, c. 49, s. 102.]
- (q.3) establishing a tariff of administration fees to be assessed pursuant to section 91.1 for the purpose of recovering any costs of administering this Act, other than removal costs, and prescribing criteria for the purpose of assessing those fees;
- (q.4) prescribing procedures for giving notice to transportation companies of assessments pursuant to section 91.1 and directions under section 93;
- (r) prescribing costs for the purposes of section 55.1;
- (s) prescribing, for the purpose of sharing responsibility for the examination of persons who claim to be Convention refugees, countries that comply with Article 33 of the Convention;
- (s.1) prescribing, for the purposes of subsection 69.1(10.1), countries that respect human rights;
- (s.2) specifying periods during which a certificate of departure referred to in section 32.02 may be issued;
- (t) prohibiting transportation companies from knowingly carrying to Canada persons, other than Canadian citizens or permanent residents, who are, in the opinion of the Minister, members of any of the classes described in subsection 19(1);
- (u) authorizing the Minister to make loans for any of the purposes referred to in subsection 119(1) and prescribing the rate of interest, if any, to be charged on those loans and the manner in which the terms of repayment of those loans shall be determined;
- (u.1) prescribing the maximum amount of outstanding advances to the Minister under subsection 119(1);
- (v) requiring any person, other than a person who is a member of the bar of any province, to make an application for and obtain a licence from such authority as is prescribed before the person may appear before an adjud-

icator, the Refugee Division or the Appeal Division as counsel for any fee, reward or other form of remuneration whatever;

(w) authorizing the issuance of visas to prescribed officials and representatives of foreign governments, states and international organizations and the suites and families of those persons and prescribing the classes of persons by whom those visas may be issued;

(x) establishing the procedures to be followed at examinations;

(y) prescribing the manner in which immigration officers shall carry out their duties and exercise their powers, whether in Canada or elsewhere;

(z) prescribing the manner in which an application may be made under section 15 or 16 and the information to be provided therewith;

(aa) requiring any person or class of persons, other than a Canadian citizen, to be in possession of a valid and subsisting passport or other travel document;

(bb) providing for the return or other disposition of any travel or other document that has been seized and held pursuant to paragraph 110(2)(b) or (c);

(cc) requiring a transportation company to collect and give to an immigration officer any written report required to be made to an immigration officer by any person leaving Canada;

(dd) specifying the manifests, bills of health or other records or documents concerning persons carried by vehicles to or from Canada that shall be maintained and carried on vehicles;

(ee) requiring the identification, supervision and detention of persons to be carried in transit through Canada;

(ff) specifying the obligations and duties of transportation companies and members of crews to safeguard persons on board vehicles, to report the escape of persons in their custody and to take such precautions as may be required to prevent those persons from unlawfully coming into Canada and, in the case of persons in their custody who are required under this Act to leave Canada, from failing to leave Canada;

(gg) requiring the master of a vehicle to make a written report to an immigration officer in respect of any person who has secreted himself in or on a vehicle coming to Canada and to hold that person in custody on the vehicle;

(hh) requiring the owner or master of a vehicle to maintain and provide an immigration officer with lists and other information concerning the members of the crew of the vehicle and their discharge, transfer, desertion or hospitalization in Canada and to notify an immigration officer of any such discharge, transfer, desertion or hospitalization in Canada;

(ii) providing for the disposition of property carried by persons who die in Canada while at an immigrant station or other place in the custody or under the supervision of an immigration officer;

(ii.1) defining any term or expression that by this Act is to be defined by the regulations;



- (ii.2) prescribing the classes of immigrants in respect of which landing shall be granted subject to terms and conditions, and prescribing those terms and conditions;
- (ii.3) prescribing the terms and conditions that may be imposed by an immigration officer including, where such terms and conditions are for the purpose of providing adequate health or social services or for fostering a strong and viable economy and regional prosperity in Canada, terms and conditions concerning place of residence and occupation;
- (ii.4) specifying, with respect to any province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of immigrants of certain classes of immigrants, the terms and conditions prescribed under paragraph (ii.3) that may not be imposed in respect of immigrants of those classes of immigrants who intend to reside in the province;
- (ii.5) specifying what constitutes a duly completed application for the purposes of this Act and the regulations;
- (ii.6) prescribing the circumstances under which an immigration officer shall approve an application to vary or cancel any term or condition imposed pursuant to subsection 14(5);
- (ii.7) prescribing for the purposes of paragraph 25.1(a) the circumstances under which a person shall be deemed not to cease to be a permanent resident; and [1992, c. 49, s. 102. Not in force at date of publication.]
- (jj) prescribing any matter required or authorized by this Act to be prescribed.

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

(3) The Minister may exercise the powers referred to in subsection (2) in respect of a person who intends to reside in a province that has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of such persons, only if the province has given its consent.

(4) Where a province has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of certain prescribed classes of immigrants,

- (a) the selections standards established under paragraph (1)(a) and all regulations made pursuant to paragraph (1)(b.1) and (f), and
- (b) the landing requirements prescribed under paragraph (1)(e), other than the landing requirements relating to membership in inadmissible classes described in section 19,

shall not apply in respect of any immigrant of any such class who intends to reside in that province.

(5) Where a province has entered into an agreement pursuant to section 108 whereby the province has sole responsibility for the selection of immigrants of the class of immigrants prescribed under paragraph (1)(a.4),

(a) regulations made pursuant to subparagraph (1)(a.5)(i) shall not apply in relation to immigrants to the extent that they intend to invest in a business or fund in that province; and

(b) regulations made pursuant to subparagraph (1)(a.5)(ii) shall not apply in relation to immigrants who intend to reside in that province.

(6) Regulations made pursuant to paragraphs (1)(a.4) and (f) must be consistent with all agreements entered into with provinces pursuant to section 108.

(7) A country may be prescribed as a country under paragraph (1)(s) for a maximum period of two years, but any such prescription may be renewed.

(8) The Governor in Council shall take the following factors into account when determining whether to prescribe a country under paragraph (1)(s) or to renew any prescription made under that paragraph:

(a) whether the country is a party to the Convention;

(b) the country's policies and practices with respect to Convention refugee claims;

(c) the country's record with respect to human rights; and

(d) whether the country is a party to an agreement with Canada concerning the sharing of responsibility for examining refugee claims, notwithstanding that this factor is not a requirement for a country to be prescribed.

(9) After prescribing a country under paragraph (1)(s), the Governor in Council shall monitor that country in relation to the factors described in subsection (8).

(10) A regulation made under any of paragraphs (1)(a) to (f.4) and (j.2) and (j.3) may, if it so provides, in relation to any prescribed class of immigrants or prescribed class of employment specified in the regulation, or in relation to any application for the approval of a business or fund, be retroactive and apply in respect of

(a) all applications for landing, for an employment authorization or for the approval of a business or fund, as the case may be, pending on the day on which the regulation comes into force;

(b) any pending application for landing, for an employment authorization or for the approval of a business or fund, as the case may be, made after

a date specified in the regulation that is before the day on which the regulation comes into force; or

(c) any pending application for landing, for an employment authorization or for the approval of a business or fund, as the case may be, that, on the day on which the regulation comes into force, had been assessed to the extent specified in the regulation.

(11) Where the Minister is authorized by regulations made under paragraph (1)(a) to award units of assessment in respect of factors that an immigration officer must take into consideration in deciding whether a visa may be issued to an immigrant, any change that is brought about by a regulation made under that paragraph to the number of units of assessment that may be awarded by the Minister shall, if the regulation so provides, apply retroactively in respect of

(a) all applications for landing pending on the day on which the regulation comes into force;

(b) any pending application for landing made after a date specified in the regulation that is before the day on which the regulation comes into force; or

(c) any pending application for landing that, on the day on which the regulation comes into force, had been assessed to the extent specified in the regulation.

(12) For greater certainty, where a regulation referred to in subsection (10) or (11) is expressed to apply retroactively, the regulation applies in respect of applications made before the coming into force of that subsection as well as in respect of applications made after the coming into force of that subsection. 1976-77, c. 52, s. 115; 1980-81-82-83, c. 47, s. 23; R.S.C. 1985 (4th Supp.), c. 28, s. 29; R.S.C. 1985 (4th Supp.), c. 29, s. 14; 1990, c. 38, s. 1; 1990, c. 49, s. 102.

### *Subsection (1)*

#### *Paragraph (a)*

*D'Souza v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 268, 39 F.T.R. 1 (Fed. T.D.).

Ms. D'Souza applied for permanent residence as an independent immigrant. Her application was submitted under cover of a letter sent by her prospective employer and noted her occupation as executive secretary. The applicant was advised by letter that a barrier to acceptance of her application was the fact that there was only a limited demand in Canada for persons in her occupation. Accordingly, the applicant was advised to obtain a confirmation of her offer of employment by the local CEC. In the meantime, her application was refused.

There is no requirement arising by implication in the Act or Regulations that the visa officer must consult on his own initiative the National Employment Service. The



applicant must demonstrate to the satisfaction of the visa officer that the criteria for admission have been met. So long as the procedures developed and followed by the Commission to fulfil its responsibilities in relation to immigration matters are not inconsistent with the requirements of the Act and Regulations, there can be no objection in law to them. The Minister must have discretion to develop administrative procedures to meet his or her statutory and regulatory responsibilities. The Court should intervene to limit that discretion only where it is clear that the procedures are inconsistent with or otherwise beyond the authority of the Minister under the Act and Regulations.

The decision to withhold the grant of a visa until confirmation of employment had been communicated from the National Employment Service to the visa officer was not an improper delegation of authority. The Regulations, in particular item 5 of schedule 1, provide for the visa officer assessing an application for permanent residence having reference to arranged employment and to consider that criterion for admission based on information provided by the National Employment Service. If this determination of particular aspects of employment is considered to be delegation, then it is delegation made by the Regulations and it is authorized. It is not a delegation made by the visa officer.

The assessment criteria established by schedule 1 to the Regulations are not inconsistent with the Act and Regulations. The requirement that a local CEC office validate arranged employment falls clearly within section 114(1)(a) as a matter within "labour market conditions in Canada for the purpose of determining whether or not an immigrant will be able to become successfully established in Canada". In the detail of factors to be considered by the National Employment Service in considering matters within item 5 of schedule 1, the Service must be careful to consider only those matters which can be justified as being clearly within the factors set out in the schedule. Section 20(3) of the Regulations is much more precise than item 5 of schedule 1. While it may be a worthwhile objective of the Employment Service to insist upon the training of Canadians, such a requirement is not clearly within the factors to be considered in relation to item 5 of schedule 1. It is not appropriate to insist that the prospective employer of an applicant/immigrant first be expected to train persons already in Canada before authorization is given to arranged employment nor is it appropriate to insist in practice upon any standard minimum period for a prospective employer to seek unsuccessfully an employee through the CEC services. The employment officer must be prepared to look at whatever evidence the prospective employer may have of the efforts to hire Canadian citizens or permanent residents. The visa officer fulfilled his duties in this case and accordingly the applications for *certiorari* and *mandamus* were dismissed.

### **Paragraph (e)**

*Dawkins v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 639, 45 F.T.R. 198 (T.D.).

The applicant sought an order quashing the decision of an Immigration officer that there were insufficient humanitarian and compassionate grounds for the exercise of discretion under section 114(2). It is not appropriate for a reviewing Court to interfere with the exercise of a statutorily granted discretion unless it is clear that this discretion was exercised unreasonably, in bad faith or was based on irrelevant considerations. The Court should not, in effect, substitute its own conclusion on an issue for that of the

administrator vested with the discretion. The respondent Minister did not fetter the discretion of Immigration officers by preventing them from considering those in the refugee backlog as eligible for the same treatment as those in the illegal *de facto* resident policy on the ground that they had previously come to the attention of the respondent. It cannot seriously be disputed that general standards are necessary for the effective exercise of discretion in section 114(2) cases. This is necessary to ensure a certain level of consistency from one decision to another and to avoid a patchwork of arbitrary and haphazard decisions. Uniformity in decision making must be balanced against a need to consider individual cases on their own merits. There is a fundamental difference between humanitarian and compassionate considerations referred to in section 114(2) and public policy also referred to in section 114(2). Public policy has no objective content and must be defined by those having the authority to define public policy. Immigration officers do not have the right and obligation to define their own public policy. With respect to the humanitarian and compassionate considerations, the guidelines are not to be regarded as exhaustive and definitive but rather the officers are expected to use their best judgment. In the context of this case, the officer was found not to have fettered her discretion or to have acted unfairly or unreasonably and accordingly the application was dismissed.

*Virk v. Canada (Min. of Employment & Immigration)* (1991), 46 F.T.R. 145 (T.D.).

This was an application to quash an Immigration officer's refusal to find sufficient public policy grounds or humanitarian and compassionate considerations to justify relief under section 114(2) of the Act. When dealing with a matter of public policy, it is completely within the mandate of an Immigration officer to seek the advice of a supervisory authority. The spousal relationship and its effect on a section 114(2) application is a public policy issue. The guidelines state that no additional hardship need be established in cases of a genuine marriage. The guidelines also say that there is no obligation to deal favourably with spouses who are inadmissible under section 19 of the Immigration Act. In this case, the officer's decision to refuse relief under section 114(2) was upheld.

*Johal v. Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 105, 15 F.T.R. 164.

The applicant had arrived in Canada in 1980 and was a valid visitor until May 14, 1981. The applicant then resided illegally in Canada until February 7, 1987, when he attended at a Canada Immigration Centre to apply for permanent resident status under the *de facto* illegal residents programme. The guidelines for this programme attempt to determine whether an illegal immigrant has economically and socially established himself in Canada. On February 16, 1987, the applicant was interviewed by an immigration officer, who then recommended to his manager that the application be favourably considered. The manager reviewed the officer's recommendation and concluded that the applicant did not meet the requirements of the programme. His decision was overturned by the Court because the guidelines for this programme were not followed nor were they applied fairly. The manager was required to do more than merely make a few telephone calls and meet with the officer in question before failing to accept the officer's recommendation. Further, the applicant was entitled to an opportunity to reply to some of the discrepancies which were affecting the manager's decision. Also, the applicant is required to establish that he has adapted himself socially to Canada. The manager

had no information in this regard which would justify overturning the interviewing officer's recommendation. The Court pointed out that the shortage of personnel to handle these types of applications was no excuse for the application not being handled properly and fairly. Accordingly, the Court ordered the quashing of the decision of the respondent to refuse the applicant's application under the *de facto* illegal residents programme. Further, the Court directed the Minister to assess and determine the application under that programme in accordance with the guidelines set forth. Further, the Court ordered that the ongoing inquiry, in respect of the applicant, be prohibited from continuing.

*De Gala v. Canada (Min. of Employment & Immigration)* (1987), 8 F.T.R. 179 (Fed. T.D.).

The applicant was a 50-year-old single person from the Philippines who came to Canada to work as a domestic for her niece. The applicant received negative initial and final assessments in interviews under the Foreign Domestic programme. Although the applicant was not a "new entrant" within the meaning of the Foreign Domestic guidelines, it was held that the "new entrant" portion of the guidelines applied to all domestics. The "guidelines or policy" as expressed in the Immigration Manual for the Foreign Domestic programme are significant and must be followed in order for procedural fairness to occur in a particular case. The applicant was not asked to contact a Canada Employment Centre for counselling and determination of training and skill upgrading needs. The evidence indicated that the interviewing officer was neither flexible nor lenient in either of the assessment interviews as required by the guidelines. The applicant had a grade 6 education as well as training as a seamstress, and this was held to be sufficient for someone seeking employment as a domestic.

The applicant was denied the use of her relative as an interpreter at the initial assessment and, in fact, no interpreter was provided. The Court observed that a person who is to be interviewed can and should be allowed to be accompanied during the interview. The Court observed, however, that the officer conducting the interview should have set conditions to prevent interference with the interview process. Failure to have a friend present who spoke English, as well as the failure to have an interpreter at the initial interview, and the conduct of the initial interview in English, undermined the assertion that the applicant was not sufficiently conversant in the English language to be able to establish herself in Canada. Accordingly, the applicant was found to have been treated in an unfair manner and the decision whereby she was found not to have demonstrated evidence of her ability to become self-sufficient in Canada was set aside.

*Aboc v. Canada (Min. of Employment & Immigration)* (1986), 7 F.T.R. 236 (Fed. T.D.).

The applicant arrived at Toronto International Airport in July 1982. She was interviewed in the usual way and ultimately was given an employment authorization, which the respondent at all times considered to be an authorization under the Foreign Domestic programme. There was no evidence of even a verbal explanation of the programme being given to the applicant at the time she entered Canada. The initial negative assessment was not communicated to the applicant. Subsequent assessments that questioned the genuineness of her degree in the Philippines were not communicated to the applicant. Due to the fact that no one had informed the applicant of what was expected of her, an order in the nature of *certiorari* setting aside the refusal to grant



the applicant access to status in Canada under the Foreign Domestic programme was issued. Further, an order was made that the applicant be allowed to continue in Canada and to return to the situation the applicant was in at the port-of-entry when she first came here. This order directed that the applicant be treated as any other fresh applicant in the Foreign Domestic programme in accordance with the existing provisions of the Statute and Regulations.

*Williams v. Canada (Min. of Employment & Immigration)*, [1985] 2 F.C. 153 (Fed. T.D.).

The applicant was born in Jamaica. She was unmarried and had 5 children, all of whom lived in Jamaica. The applicant arrived in Canada in September 1979 for a 3-week visit and remained in Canada ever since. The applicant was informed by a lawyer in late 1983 that the long-term illegal migrants' programme did not apply to her because she had not been "underground" for 5 years. On May 29, 1984, the applicant was apprehended and a deportation order was made June 8, 1984. Judicial review of this order was dismissed in November 1984. The applicant's removal in December 1984 was deferred in order that the applicant's case could be reviewed to determine whether she then qualified under the long-term illegal migrants' programme. The applicant did not qualify under the programme. During the period when the applicant's case was being considered, the long-term illegal migrants' programme was modified in such a way that the applicant would have been eligible for the programme but for the fact of her apprehension. The application to restrain the applicant's removal was dismissed. Where a person has been lawfully ordered deported, and the procedure that he or she wishes to invoke is a purely discretionary one in the hope that he or she might be granted a Minister's permit to stay in Canada, any requirement of fairness in the exercise of the Minister's discretion is minimal. Such a case does not involve a benefit to which the applicant is legally entitled nor denial of any rights legally vested in the applicant. There was no denial of fairness because the applicant did not, albeit for different reasons, come within the old or new guidelines of the long-term illegal migrants' programme.

### *Subsection (2)*

*Eliyathamby v. Canada (Min. of Employment & Immigration)* (1994), 76 F.T.R. 156.

The applicant sought to review a negative CRDD decision. The applicant was a Tamil and as such faced persecution in the Jaffna area of Sri Lanka. The stated ground of review was that the Board had misconstrued significant aspects of the evidence. One piece of evidence was a letter from the United Nations High Commissioner for Refugees, dated July 9, 1992, to the Chair of the Immigration and Refugee Board. The letter dealt with the mandated return of persons from Sri Lanka as well as the question of an internal flight alternative. The Court could not conclude that the Board had applied an improper test or otherwise misconstrued the evidence and therefore dismissed the application. However, the Court noted that the UNHCR letter applied not only to the refugee question, but also was relevant to the assessment of whether humanitarian and compassionate grounds existed. The letter stated that individuals moving from an unsafe area in the north could not normally be expected to return in safety and dignity to the south and therefore should be allowed to stay in Convention countries for humanitarian reasons.

The Court noted that it assumed that this letter would be taken into account when humanitarian and compassionate assessment was made of the applicant's case.

*Nagy v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1375-93, March 11, 1994.

The applicant sought to review a decision holding that there were insufficient humanitarian and compassionate grounds for allowing an application for permanent residence within Canada. The immigration officer did not give reasons for refusing to recommend that the Minister exercise his discretion under section 114(2). The case law has been consistent and clear to the effect that reasons are not required in this context. Section 77 only requires reasons to be given to a person who sponsors a family member's application for permanent residence where that application is refused. The matter, in this case, had nothing to do with Luis Nagy, the applicant's sponsor, since he was not part of the section 114(2) application and therefore no reasons were required.

*Ivanov v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 250, 68 F.T.R. 63.

The applicant sought to set aside a negative decision on a humanitarian and compassionate request pursuant to section 114(2). No reasons were given for the negative humanitarian decision. Submissions had been forwarded to the respondent's representative outlining the applicant's long term common-law relationship and the intention of the common-law partner to sponsor the applicant as soon as the partner obtained landing.

The immigration file contained information about the applicant's long term common-law relationship and about his intent to marry. The Commission's own directives indicate that this is *prima facie* grounds warranting a favourable consideration. If the immigration officer had doubts about the marriage, the rules of natural justice and fairness dictated that the applicant should be allowed the opportunity to respond to those concerns. No interview was held in the present case and no opportunity to respond to those concerns was given to the applicant.

Accordingly, the negative decision was set aside and the matter referred back for reconsideration.

*Muse v. Canada (Solicitor General)* (1993), 68 F.T.R. 144, 22 Imm. L.R. (2d) 276.

The applicant, a citizen of Somalia, unsuccessfully claimed refugee status. The applicant then submitted a request to the Minister of Employment and Immigration and to the Governor General in Council, requesting permission to be admitted to Canada as a permanent resident pursuant to section 114(2) of the Act. The request was denied, in part because the applicant could not demonstrate that he was at any greater risk than anyone else in the general population of Somalia under the prevailing conditions in that country in December, 1992. The respondent's officials, in requiring the applicant to be at greater risk than anyone else in the population, fettered their own discretion by imposing a rigid requirement which was inconsistent with the intent of the Immigration Act and ministerial policy. The decision was quashed and the respondent directed to properly reconsider the applicant's request for section 114(2) relief.

*Ramoutar v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 203, 65 F.T.R. 32, [1993] 3 F.C. 370.

This application was for judicial review to quash a decision not to refer the applicant's case to the Governor-in-Council for an exemption, from the requirements of section 9(1) of the Immigration Act, on humanitarian and compassionate grounds.

The applicant had married a Canadian citizen. An Immigration officer, after reviewing the case, felt there was a reasonable doubt about the *bona fides* of the marriage and declined to refer the matter to the Governor-in-Council.

In assessing the *bona fides* of the applicant's marriage to a Canadian citizen on the basis of requiring proof of such *bona fides* beyond a reasonable doubt, the respondent erred in law. Proceedings under section 114(2) of the Immigration Act are civil in nature and therefore the appropriate standard of proof is proof on a balance of probabilities — the standard applicable in civil proceedings.

*Maraj v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 90 (Fed. T.D.).

This was an application for leave to commence a proceeding under section 18.1 of the Federal Court Act to quash a decision of an immigration officer finding insufficient humanitarian and compassionate grounds to permit an application for landing from within Canada.

A portion of this decision deals with the method by which the Governor in Council functions in the Canadian constitutional system of government.

*Ferrerya v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 270 (T.D.).

The applicant arrived in Canada as a visitor. He asserted a claim for Convention refugee status and that claim was found to have no credible basis. The applicant did not report to Immigration authorities and remained in Canada illegally. He finally resurfaced, making an application for landed immigrant status on the basis that he had a Canadian wife. The applicant was exempted from subsection 9(1) of the Immigration Act. An Order in Council exempting an individual from the visa requirements of subsection 9(1) does not confer a right to permanent residence. The exemption's effect is to allow the making of an application for landing despite the fact that the applicant is already within Canada. In this case there was no final determination of the applicant's application made on the merits prior to the subsection 9(1) waiver being given. Therefore the waiver did not accord to the applicant any right to permanent residence in Canada.

*Dick v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 25, 52 F.T.R. 318 (T.D.).

The applicant sought orders in the nature of *certiorari* and *mandamus*. *Certiorari* to quash a decision determining that there was insufficient humanitarian and compassionate grounds upon which to accept an application for permanent residence. The motion for relief in the nature of *mandamus* was to compel the respondent Minister to provide the applicant with a full and fair interview in accordance with the law and in accordance with the duty of fairness.

There was a disagreement as to what occurred at the impugned interview. The applicant in her affidavit set out her recollection of what took place, the immigration



officer in his affidavit set out his version. There was no cross-examination on the affidavits, which made it difficult for the Court to determine the question of credibility.

The onus was on the applicant to satisfy the Court that there was reversible error warranting judicial interference. This was not an appeal or a retrial matter. The Court, in the absence of error in the legal sense, could not substitute its opinion for the discretion exercised by the Immigration officer in coming to the decision he did.

The evidence failed to make out that there was a likelihood of bias on the part of the officer and the case was dismissed.

*Said v. Canada (Min. of Employment & Immigration)* (1992), 91 D.L.R. (4th) 400 (Fed. T.D.).

The applicant made a claim for refugee status which was found to have no credible basis. The Immigration Manual provides that such persons are to have their claims reviewed to see if humanitarian and compassionate grounds exist for permitting them to remain in Canada, but does not provide that the person concerned is entitled to notice or to make any submissions before such interview takes place. Although section 114(2) does not vest any rights in an applicant, it creates a duty of fairness in the Minister when exercising the power contained in that subsection. At a minimum the applicant must have some opportunity to state his case. The Governor in Council is not required to give any reasons for its decision to grant or refuse discretionary relief.

*Editor's Note:* Although the subsection has been amended, the principles enunciated in this case may still be useful.

*Ha v. Canada (Min. of Employment & Immigration)* (1992), 8 Admin. L.R. (2d) 59, 56 F.T.R. 74 (Fed. T.D.).

An Immigration officer rejected the applicant's request for landing on humanitarian and compassionate grounds. An order was also sought prohibiting the commencement of the credible basis hearing until such time as a new humanitarian and compassionate interview was conducted. The applicant was a refugee claimant from Hong Kong. He was in the refugee backlog and received a notice to attend an interview to determine whether sufficient humanitarian and compassionate grounds existed to grant landing. Counsel for the applicant was unable to attend this interview due to short notice. He did write a four-page letter in which he requested that the interview be rescheduled. The Immigration officer who conducted the interview declined to reschedule and concluded that no sufficient humanitarian and compassionate grounds existed to justify landing the applicant.

There is no obligation under subsection 114(2) to conduct an interview or hearing. There is no authority for the submission that the claimant is entitled to be represented by counsel once an interview is offered. The right to counsel is dealt with in section 30 of the Act and in sections 27 to 39 of the Regulations. These provisions refer to the right to counsel at an inquiry. There is no corresponding statutory right to counsel during a subsection 114(2) interview.

Given that an interview is offered there is a duty to act fairly. The concept of what constitutes procedural fairness in purely administrative proceedings varies depending on the type and nature of the proceedings, the nature of the rights involved, possible burdens of the process and the possibility of harm if an adverse decision is reached. The applicant has no legal right to remain in Canada until such time as he is found to be a Convention

refugee. The determination of whether humanitarian and compassionate grounds exist is discretionary and can be made without personal appearance. It is a decision that involves no complex legal issues. A negative determination does not lead to removal, but rather the claim then proceeds to the next stage in the process, an oral hearing into the merits, at which time there is a right to legal representation. The duty of fairness dictates that the *audi alteram partem* principle be adhered to and in many instances this will require the services of a qualified interpreter.

The Court concluded that there was no procedural unfairness and dismissed the application.

*Editor's Note:* The refugee provisions have changed but the principles enunciated in the case may be useful.

*Pollard v. Canada (Min. of Employment & Immigration)* (1991), 48 F.T.R. 153 (T.D.).

This case illustrates the difference between strict judicial review and an appeal *per se*. Although the Immigration officer's decision could not be legitimately quashed on *certiorari*, the Court commented that it was unfortunate in the extreme that there was no genuine appeal to the Court. In this case, the applicant sought to quash a decision of an Immigration official at the Toronto Backlog Clearance Centre wherein that official determined that there were insufficient humanitarian and compassionate grounds upon which to accept the applicant's application for permanent residence.

The Court commented that the disgraceful problem with the application of the guidelines is that they make it possible to arrive at the conclusion that the decision-maker wished to formulate all along. The Court found, with genuine sorrow, that there was no basis in terms of judicial review for quashing the officer's decision.

*Cheema v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 117, (*sub nom. Cheema v. Ministre de l'emploi et de l'Immigration*) 44 F.T.R. 154 (T.D.).

The applicant, a citizen of India, made a refugee claim and was denied refugee status. This occurred in 1986. The applicant applied for redetermination of his claim under the procedure that was then applicable, and his motion for redetermination was dismissed and a removal order was made against him. The applicant did not appear for execution of the order. In 1990, the applicant was arrested and ultimately in February 1991 returned to India. Prior to his return, the applicant attempted to make an application under section 114(2) but was informed by a representative of the Immigration Commission that no such application was possible. This decision was held to contravene section 7 of the Charter. The applicant was entitled to present his humanitarian grounds to the Minister even though his refugee claim had been dismissed. The Court noted that this decision did not necessarily include the right of the applicant to return to the country, noting that the hearing, at least for the moment, need not necessarily be held in the party's physical presence but could be held by way of telephone communication. Accordingly, the Court directed both parties to conduct a hearing in this manner and made an order under section 24 of the Charter to this effect.

*Vaca v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 315, 50 F.T.R. 10 (T.D.).

The applicant and his wife arrived from Ecuador and claimed refugee status, although the record was silent about the date that the claim was first made. The applicant attended for a humanitarian and compassionate interview. That interview could not take place because the Minister could not locate the applicant's file. In allowing the application the Court noted that the Immigration officer indicated that she had read the applicant's affidavit, fully explained to the applicant the purpose of a humanitarian and compassionate review, explained how usually a person seeking to land in Canada must apply from outside the country but if they establish special circumstances it could be recommended that a person be landed from within Canada, asked the applicant the factors he wished considered and considered those factors, listened to representations from counsel and then, after listening to all the oral representations, read the written representations and made a decision within 30 minutes. The Court felt that a 30-minute hearing covering all the material filed and hearing representations was not doing justice to the applicant, notwithstanding an offer to allow further written submissions that day. The Court commented on the myriad of letters and affidavits of support from family, friends and neighbours, the English language certificate, the doctor's and priest's support, the purchase of the home, the participation in a business all of which might go to the establishment of a case on humanitarian and compassionate grounds. An order in the nature of *certiorari* was granted, quashing the decision of the Immigration officer and directing the respondent to properly review the applicant's request for consideration under subsection 114(2). The Court also directed that a different Immigration officer review the material from the one who made the original decision.

*Parihar v. Canada (Min. of Employment & Immigration)* (1991), 16 Imm. L.R. (2d) 144, 50 F.T.R. 236 (T.D.).

The applicants brought a motion to quash a decision of an Immigration officer which determined that there were insufficient humanitarian and compassionate grounds to allow the applicant to apply for landed immigrant status from within Canada. The applicant, Balvir, married the applicant, Mohinder, on November 3, 1990. Mohinder is a permanent resident. The officer noted that information provided in the marriage questionnaire was materially different from the information given at the interview, causing the officer to believe that the marriage was entered into for the purpose of obtaining permanent resident status.

The Court commented twice that it would be preferable if the humanitarian and compassionate interviews were tape recorded to avoid the situation where the Court is presented with conflicting affidavits about what occurred at the interview. The subsequently prepared affidavit of the Immigration officer is not part of the record. The Court noted that it was troubling to see affidavits prepared a considerable time after the event by officers who must interview a great number of people over the course of several months. So far as memory was concerned, the Court stated that it would have expected that the individuals being interviewed would have a clearer memory of what occurred because it was an experience unique to them. It was in this context that the Court noted it would be much fairer for all concerned if the interviews were taped.

In this particular case, the Court concluded that the applicants' memories of the events were likely sharper than the officers, although the Court took care not to suggest



that it was casting any doubts on the officer's attempt to accurately reconstruct what occurred, and quashed the decision that there were not sufficient humanitarian and compassionate grounds.

*Vidal v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 123 (Fed. T.D.). See also *Dadwah v. Canada (Min. of Employment & Immigration)* (1991), 13 Imm. L.R. (2d) 123 (Fed. T.D.).

The Court set out certain basic propositions which are self-evident and which must be kept in mind in dealing with section 114(2) applications. They are as follows:

1. In section 114(2), Parliament authorized the Governor-in-Council to make exceptions to the rules found in the Act and Regulations. There is therefore nothing inconsistent with the Act in the Governor-in-Council creating such exceptions by regulation.
2. The exceptions so made are for the benefit of those in whose favour they are made and do not detract from the normal application of the general rules to all others.
3. The discretion conferred under section 114(2) is conferred on the Governor-in-Council, not on the Immigration Officer who conducts the interview. The latter reports to the Minister with a recommendation. By the normal processes of Cabinet Government, the Minister of Employment and Immigration in turn would review the report and recommendation and if in agreement make a recommendation to the Governor-in-Council for the exercise of his discretion.
4. There is nothing in law to prevent the Minister or the Governor-in-Council from exercising discretion in favour of an applicant where special submissions are made on behalf of the applicant directly to the Minister or Governor-in-Council either in the absence of any recommendation from an Immigration Officer or despite a negative decision of the Immigration Officer.
5. There are two grounds for favourable action under section 114(2); public policy and compassionate or humanitarian considerations. These two grounds are quite different. Humanitarian and compassionate considerations have some kind of objective meaning intended by Parliament which must not be artificially narrowed through the fettering of the discretion of immigration officers in applying those words. Subject to certain very broad limitations the content of "public policy" must be defined by those having the authority to fix public policy and the political responsibility for its content.
6. The court should not interfere with the exercise of discretion by an officer or body authorized by statute to exercise that discretion unless it is clear that the discretion has been exercised in bad faith or on grounds unrelated to the purposes for which the discretion is granted.

Guidelines for the exercise of discretion on humanitarian and compassionate considerations are permissible so long as these guidelines are intended to be statements of general policy or rough "rules of thumb" and not an exhaustive definition binding on immigration officers.

An applicant cannot complain if an Immigration Officer fails or refuses to follow the Minister's guidelines nor can he complain if an Immigration Officer applies any factor in lieu of those in the guidelines as long as this is done in good faith and the factor is not wholly irrelevant to any conceivable view of humanitarian and compassionate considerations. Further, it is for the officer to decide if he is convinced of the truth of the applicant's assertions unless perhaps he makes findings of fact which are clearly

without regard to the material before him. It is not for the Court to sit in appeal on his findings of fact or his weighing of the various factors. The guidelines issued after the *Yhap* decision appear to be statements of general policy and similar in tone to that of Chapter 9 of the Manual which was viewed with approval by Jerome A.C.J. in the *Yhap* case. These guidelines treat separately the humanitarian and compassionate grounds in the public policy situation.

In the *Dadwah* case, the officer's recommendation was set aside because the officer stated that the rather unusual circumstances suffered by the Dadwahs in Trinidad were not sufficient grounds for a favourable decision because they did not come within the guidelines. It was open to the officer to reject these allegations on the basis of credibility and this Court could not review such a finding if made in good faith. The officer could have rejected this aspect of the applicant's case on the grounds that in her view it did not involve a situation where humanitarian and compassionate considerations were relevant if she honestly reached that conclusion but the officer was not entitled to reject the case simply because it was not covered by the guidelines. Accordingly, the officer's decision was set aside. With respect to the *Vidal* matter, that decision was upheld because no similar error was made.

*Editor's Note:* The subsection has been amended but the principles enunciated here may still be useful.

*Orantes v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 90-T-602, March 13, 1990.

The Court criticized very strongly the fact that the application for leave was not filed by the Student Legal Aid Clinic because of the onset of Christmas holidays but nevertheless extended the time for filing a notice seeking leave to appeal. The applicant sought orders in the nature of *certiorari* and *mandamus* in regard to the respondent's having invoked section 19(1)(b) of the Act and their not having invoked section 114(1) of the Act in his favour. The denial of permanent residence was based on the fact that the applicant and his dependents had been in receipt of social assistance since 1986 and that neither his Canadian citizen son nor permanent resident son were in a financial position to sponsor him or his dependents. Section 114(2), it was noted, provides that the Cabinet may by regulation exempt any person from any regulation made under section 114(1). Cabinet cannot repeal, suspend or override or exempt anyone from any provision of the Immigration Act itself, just the regulations. Without parliamentary authority, the Governor-in-Council has no authority to exempt anyone from the law. If parliamentary democracy is to survive in Canada, Parliament must make choices about which foreigners, if any, may be legally admitted for permanent residence and not become helpless in the face of asserted entries by aliens no matter how sympathetic their cases. It takes a certain degree of intellectual toughness to support the principles of democracy in the face of various individuals who seek migration into Canada against the will of the democratically elected representatives of the people. If the Charter is interpreted in such a manner as to obviate the will of Parliament in a matter such as this, it is the sort of frustration which would ultimately destroy national government by amputating the lawful means of governance. Whether it is even appropriate to require genuine refugees to be able to support themselves in this applicant's circumstances is a question of policy which cannot be resolved by a Court since the requirement does not violate the Constitution. Accordingly, the application for leave to appeal was dismissed.

*Ken Yhap v. Canada (Min. of Employment & Immigration)* (1990), 9 Imm. L.R. (2d) 243 (Fed. T.D.).

The applicant indicated an intention to claim refugee status in Canada prior to January 1, 1989 and was included in the backlog clearance program established by the Minister. The Minister refused to consider the applicant under the operations memorandum dealing with Chinese nationals who had temporary status in Canada. That policy was not intended to replace provisions which have been made for refugees whether recent arrivals or members of the backlog from the People's Republic of China but rather was intended to act as a supplemental protection for other individuals from that country. Regardless of what promises and what guarantees have been made by the Minister, the applicant is entitled, by virtue of section 114(2) to a review as to whether humanitarian and compassionate grounds exist sufficient to warrant landing in Canada. This law must be applied evenly to all persons. The discretion confirmed by section 114(2) is not to be exercised by the Minister and her officials subject to inflexible and self-imposed limitations, although an expression of flexible general policy, such as that contained in chapter 9 of the Immigration Manual would be entirely lawful. The policy directives and guidelines pertaining to the humanitarian and compassionate review portion of the backlog clearance program were set out in a document entitled "Refugee Claimants Backlog Procedures". These guidelines limit their application to particular classes of persons, mainly "members of official delegations, athletic teams or cultural groups", and persons in "family dependency situations" described more specifically in the guidelines. Officers have not been questioning applicants on humanitarian and compassionate issues which fall outside the designated criteria. These policy guidelines constituted a fetter on the statutory power of the Governor-In-Council to both exempt persons from the requirement of section 9(1) of the Act and to authorize the landing of persons for humanitarian and compassionate reasons pursuant to section 114(2). The applicant is entitled to a full and fair review to determine the existence of humanitarian or compassionate considerations. The right to this review was confirmed by the Supreme Court of Canada in the *Min. of Employment & Immigration v. Jimenez-Perez*, [1984] 2 S.C.R. 565 and this consideration is to take place independently of the consideration of the basic merits of any other application advanced by the applicant. Even in the case where it is evident that all other claims and applications advanced by the applicant are doomed to failure, the applicant's right to consideration on humanitarian and compassionate grounds may not be unduly restricted. The factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.

The discretion afforded an immigration officer by section 114(2) is wide. The officer is asked to consider reasons of public policy as well as the existence of compassionate or humanitarian considerations. Neither the section of the Immigration Act which sets out definitions of terms nor the regulations describe in any greater detail how this section is to be applied nor what interpretation the officer is to give to the rather broad terms contained in this section. Chapter 9 of the Immigration Manual assists an officer in assessing situations and the humanitarian and compassionate issues raised by them which include problems with spouses, family dependencies, difficulties with return to the country of origin, illegal *de facto* residents, and situations involving marriage breakdowns. By comparison, the guidelines contained in "Refugee Claimants Backlog Procedure" are



rigid and inflexible. These criteria are limited and refer only to a carefully selected segment of the backlog population. Applicants who are not members of official delegations, athletic teams or cultural groups and who are not close family members of Canadian residents are excluded from the review subject to these criteria. Chapter 9, on the other hand, constitutes a general policy or rough "rules of thumb" which are appropriate and lawful structuring of the discretion conferred by section 114(2). These guidelines might have acted as a model for the drafting of guidelines to be used in conjunction with a humanitarian and compassionate review of refugee claimants in the backlog. Accordingly, the decision of the immigration officer at the backlog clearance centre with respect to the respondent was quashed and an order in the nature of *mandamus* was issued compelling the Minister to provide the applicant with a full and fair interview of his humanitarian and compassionate claim.

*Kaur v. Min. of Employment & Immigration* (1987), 5 Imm. L.R. (2d) 148 (Fed. T.D.).

The applicants were married to each other pursuant to an arranged marriage as is the custom of their religion. The marriage took place in Canada and a request pursuant to section 115(2) was made to permit the application for permanent residence to proceed from within Canada. This request was denied by the respondent. The letter from the Department indicated that the marriage was entered into for "immigration purposes." This opinion was based on the fact that the information provided by the applicants, with respect to their marriage, was contradictory and inconsistent. This decision was set aside because the Department did not provide the applicants with any information about the inconsistencies, nor did it indicate whether the inconsistencies were the sole reason for its decision. Finally, there was no opportunity granted to the applicants to comment on these inconsistencies.

*Sobrie v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2596-86, July 30, 1987.

Immediately following his arrival in Canada from Africa, the applicant claimed status as a Convention refugee. At each stage his application was denied. Ultimately, the applicant became the subject of an exclusion order. Notwithstanding the extensive file that the respondent had on the applicant, the applicant must be given an opportunity to illustrate to the Minister the existence of humanitarian and compassionate grounds under section 115(2). The immigration officials had assumed, quite logically, that their extensive file provided all the information that could possibly be relevant to that determination. However, the applicant had to be given an opportunity to provide information to support his claim, something that had not occurred to date. This did not mean that the applicant was entitled to a full oral hearing; however, it followed that for the Minister to act fairly in considering an application under this section, he must be able to direct his mind to what the applicant felt were the humanitarian and compassionate circumstances of his case. An order was issued compelling the respondent to review his decision that no humanitarian or compassionate grounds existed and to consider written submissions made by the applicant on this issue. Prohibition to restrain the respondent from removing the applicant from Canada until his claim had been dealt with was refused because prohibition did not lie to restrain the Minister from carrying out his statutory duty pending a discretionary decision on a collateral submission.

*Downes v. Canada (Min. of Employment & Immigration)* (1986), 4 F.T.R. 215 (Fed. T.D.).

The applicant was a citizen of Barbados who came to Canada in 1980 and decided to stay. While in Canada, he fathered a child, who was born April 4, 1985. He obtained custody of his infant son from a Provincial Court. The applicant had four other children living with their two natural mothers in Barbados, support for whom he contributed. After his arrest, the inquiry was held in abeyance pending the termination of this Notice of Motion. Two requests were made by the applicant for an officer-in-charge of the hearing in Canada, based on humanitarian and compassionate grounds. Both requests were denied without the benefit of a personal interview.

The contention that the relationship between the parent father and his infant son was a "liberty interest" within the meaning of section 7 of the Charter was rejected. Normal connotation of the words "liberty" and "security of the person" was held to be suggestive of physical well-being in the context of freedom from arbitrary arrest, detention, imprisonment and unlawful restriction or restraint of the person. Emotional stress was held not to be the sort of deprivation of security of the person that was contemplated by section 7 of the Charter of Rights. There was no evidence that the child's security of the person would be prejudicially affected if he was forced to accompany his father to Barbados. There was, further, no evidence of any real or likely threat to the physical integrity or well-being of the infant applicant if the father returned to Barbados and the infant remained in Canada. The only stress flowed from the normal and natural filial concerns or anxieties that would arise on enforced separation from the father parent.

The right to freedom of association was held not to extend to embrace the filial association of parent and child in its ordinary everyday meaning, and, thus, there was no denial of the applicant's right to freedom of association under the Charter.

Finally, with respect to the principles of fundamental justice, it was held that Canada had the right to enact immigration laws and to implement immigration policy that may dictate the extent to which persons can enter or be permitted to remain in Canada. The decision to refuse an in-person officer-in-charge interview was purely administrative. Finally, the request was considered on its merits, and insufficient compassionate and humanitarian grounds were found to exist.

The Minister's response to the first request for an officer-in-charge interview set out to a reasonable and sufficient degree the nature of the case the applicant had to meet. Thus, the Court concluded that the manner in which the requests were dealt with exemplified fairness, and, ultimately, the Court was satisfied that the applicant was treated fairly in the circumstances. Accordingly, the applications were dismissed.

*Ochnio v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1919-85, September 23, 1985.

The applicant sought an order quashing a refusal of an employment authorization. The applicant, Jan Ochnio, a medical research physician, was lawfully admitted to Canada as a visitor on a scholarship to undertake a year of post doctoral studies in his specialty, cancer research, at the University of British Columbia.

In January 1985, while in Canada, the applicants made inquiries about applying for permanent residence. Special assessment interviews were arranged and conducted on July 17, 1985 and August 6, 1985. The applicants were seeking an exemption from section 9(1) of the Immigration Act pursuant to section 115(2) of the Act, the requirement

that they have an immigrant visa before appearing at a port of entry. The immigration officers who conducted the interviews in July and August recommended that an application for landing should be processed from within Canada and that the applicants should be exempt from section 9(1) of the Act.

After the August 6, 1985, interview, counsel for applicants was advised that he could expect a decision within two weeks. On their behalf, counsel requested an employment authorization and was advised that this could not be issued until a decision had been made to grant the exemption. Counsel was finally informed that the officers' decision to recommend positively an exemption had been forwarded to the regional office but had not been accepted at that level. The regional office indicated that it would reconsider the case should the applicants be able to obtain a letter from the British Columbia College of Physicians and Surgeons stating that there was a need for the applicants' services in British Columbia. The decision to refuse to issue an employment authorization was quashed. Operations memorandum IS 2.51 clearly indicated that the authority to make recommendations of this type was to be kept at the examining officers' level unless the officers' decision was negative, in which case the officers were to have recourse to the advice of a manager or supervisor. In this case, because the officers had decided to positively recommend an exemption from section 9(1), it was their duty to forward this recommendation to the Governor in Council and they were in error in seeking the concurrence of the regional office in their positive recommendation.

This type of decision by immigration officers was held to be an administrative function; the officers were bound to follow the policy of the government and had a duty to act fairly and conform to regulations and policy. The Court indicated that it could perceive an abuse of policy in this area if superiors, not working in the field, could override the decision of the interviewing officers, particularly in circumstances where they could reject the decision without specifying reasons or offering any explanations.

*Min. of Employment & Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, [1985] 1 W.W.R. 577, 9 Admin. L.R. 280, 14 D.L.R. (4th) 609 (S.C.C.).

The Minister of Employment and Immigration through his officers is under a duty to consider applications for exemption on compassionate or humanitarian grounds from the requirement of section 9 of the Immigration Act and to advise the applicants of the results of their application. The application for landing from within Canada should be considered and adjudicated upon if and when the exemption sought from section 9(1) is granted. That application would be subject to whatever rights of appeal are granted by the Immigration Act.

*Kee v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2776-83, March 9, 1984.

The applicant sought an order prohibiting the respondent from proceeding with the execution of a deportation order, pending the determination of the applicant's criminal conviction appeal and the application pursuant to section 115(2) of the Immigration Act for special consideration. Prohibition will not issue directing the Minister of Employment and Immigration to disobey a valid deportation order which he is under a statutory duty to carry out solely on the grounds that the applicant has not exhausted every legal remedy available to him.



*Singh v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2287-83, November 18, 1984.

The fact that an application is pending before the Governor in Council requesting discretionary relief under this section of the Immigration Act creates no legal grounds for ordering a Minister not to carry out a lawful deportation order.

*Persad v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-140-83, October 18, 1983.

In view of the provisions of sections 50, 51 and 52 of the Immigration Act, the Court was not prepared to import into the provisions of section 115(2) a power to suspend a deportation order pending a decision by the Governor in Council on the appellant's application under section 115(2).

## Orders

### POWERS OF MINISTER.

115. The Minister may, by order,

- (a) establish such forms as the Minister deems necessary for the purposes of the administration of this Act, other than forms relating to claims, appeals and applications before the Refugee Division or the Appeal Division; and
- (b) designate ports of entry and immigrant stations for the purposes of this Act. 1976-77, c. 52, s. 116; R.S.C. 1985 (4th Supp.), c. 28, s. 30.

## Evidence

### PROOF OF DOCUMENTS — *Forms established by Minister.*

116. (1) Every document purporting to be a removal order, conditional removal order, rejection order, warrant, order, summons, direction or other document signed by the Minister, the Minister of National Health and Welfare, the Deputy Minister, an adjudicator, an immigration officer, a master or other person authorized or required by or under this Act to make the document is, in any prosecution or other proceeding under or arising out of this Act, evidence of the facts contained therein without proof of the signature or the official character of the person appearing to have signed the document, unless called into question by the Minister or any person acting for the Minister or for Her Majesty.

(2) Every form purporting to be a form established by the Minister shall be deemed to be a form established by the Minister under this Act, unless called into question by the Minister or any person acting for the Minister or for Her Majesty.

(3) A document purporting to be a certificate issued by or under the authority of the Secretary of State for External Affairs stating

- (a) that any convention, treaty or other international agreement was or was not in force and that Canada was or was not a party thereof, or
- (b) that Canada agreed or did not agree to accept and apply the provisions of any convention, treaty or other international agreement in an armed conflict in which Canada was involved,

is admissible in evidence in any proceeding under this Act without proof of the signature or authority of the person appearing to have issued it, and is proof of the facts so stated. 1976-77, c. 52, s. 118; R.S.C. 1985 (3d Supp.), c. 3, s. 10; R.S.C. 1985 (4th Supp.), c. 28, s. 31; 1992, c.49, s. 103.

*Re Douglas* (1981), 5 W.C.B. 354 (Ont. H.C.).

A detention order was signed by an immigration officer in a space designated "authorized officer and title." Section 118 had the effect of making this a valid detention order without proof of the signature or of the official character of the apparent signatory.

*Jakubowski v. Min. of Employment & Immigration*, [1980] 2 F.C. 448 (Fed. C.A.).

A memorandum purporting to be signed by a senior immigration officer, reciting that the officer had been informed that the applicant was not a Convention refugee and requiring the inquiry to resume, was evidence of the facts it contained unless called into question by the Minister or by a person acting for him or for Her Majesty.

*Ramjit v. Min. of Manpower & Immigration*, [1976] 1 F.C. 184 (Fed. C.A.).

The document read at the inquiry and referred to as a direction was not marked as an exhibit to the transcript. The Court held that there was nothing in the record of the proceedings to show, therefore, that the person who issued the direction was authorized so to do. The document was in fact marked as Exhibit "A", although the Exhibit "A" before the Federal Court did not correspond to what was described in the transcript and read at the proceedings.

## REPORTS PRIVILEGED.

117. No security or criminal intelligence report, information or evidence referred to in subsection 39(2), section 40.1 or subsection 81(2) may be required to be produced in evidence before a court, person or body with jurisdiction to compel the production of information. 1976-77, c. 52, s. 119; 1984, c. 21, s. 85; R.S.C. 1985 (4th Supp.), c. 29, s. 15; 1992, c. 49, s. 104.

## Recovery of Payments, Costs and Fines

**ASSIGNMENT OF UNDERTAKINGS TO PROVINCES — Recovery for breach of undertaking — Debt due to Crown — Charge on property.**

118. (1) Where any person or organization gives an undertaking to the Minister to assist any immigrant in becoming successfully established in

Canada, that undertaking may by notice in writing be assigned by the Minister to Her Majesty in right of any province.

(2) Any payments of a prescribed nature made directly or indirectly to an immigrant that result from a breach of an undertaking referred to in subsection (1) may be recovered from the person or organization that gave the undertaking in any court of competent jurisdiction as a debt due to Her Majesty in right of Canada or in right of any province to which the undertaking is assigned.

(3) All costs incurred by Her Majesty for which any person is liable under this Act and all fines, court costs and administration fees imposed on or finally assessed against any person under this Act may be recovered as a debt due to Her Majesty.

(4) All costs incurred by Her Majesty in right of Canada or in right of any province for which any person or organization is liable under this Act and all fines, court costs and administration fees imposed on or finally assessed against any person or organization under this Act shall, until they are paid, be a charge on the property of the person or organization and may be enforced or collected by the seizure and sale of such property or a portion thereof under the warrant or order of a superior, county or district court. 1976-77, c. 52, s. 120; 1992, c. 49, s. 105.

### *Subsection (2)*

*Bilson v. Kokotow* (1978), 23 O.R. (2d) 720 (Ont. C.A.).

An undertaking to the Government of Canada to provide for the accommodation, care and maintenance of a prospective immigrant does not create any contractual right enforceable by the immigrant.

## **Loans to Immigrants**

### ***LOANS TO IMMIGRANTS — Repayment to Receiver General — Limitation — Report to Parliament.***

119. (1) The Minister of Finance may, from time to time, advance to the Minister out of the Consolidated Revenue Fund such sums as the Minister may require to enable the Minister to make loans to such classes of immigrants and such other classes of persons as may be prescribed for the purpose of

- (a) paying the costs of establishing that they and their families may be granted admission;
- (b) paying the costs of obtaining transportation to Canada and transportation from the port of arrival to the place of destination in Canada for them and their families; and
- (c) paying the reasonable living expenses of those persons and their families



and such other expenses as are prescribed in order to assist those persons in establishing themselves successfully in Canada.

(2) The Minister shall pay to the Receiver General all moneys the Minister receives by way of repayments of loans made under subsection (1) and all payments of interest thereon.

(3) The total amount of outstanding advances to the Minister under subsection (1) shall not at any time exceed the amount prescribed under paragraph 114(1)(u.1).

(4) The Minister shall, within six months following the commencement of each fiscal year or, if Parliament is not then sitting, within the first fifteen days next thereafter that either house of Parliament is sitting, cause to be laid before Parliament a report setting out the total number and amount of loans made under subsection (1) during the preceding fiscal year. 1976-77, c. 52, s. 121; 1980-81-82-83, c. 1, s. 1; R.S.C 1985 (2nd Supp.), c. 46, s. 1; R.S.C. 1985 (4th Supp.), c. 1, s. 27; 1990, c. 38, s. 2; 1992, c. 49, s. 106.

#### Assistance on Leaving Canada

#### *ASSISTANCE IN CERTAIN CASES.*

120. The Minister may direct that the costs of transportation from Canada and any related expenses be paid out of moneys appropriated by Parliament in the case of persons

- (a) whose costs of transportation are not, under this Act, payable by a transportation company;
- (b) who should, in the opinion of the Minister, be assisted in leaving Canada in order to avoid separation of a family or for other good cause; and
- (c) who is, in the opinion of the Minister, unable to defray, without hardship, their own costs of transportation. 1976-77, c. 52, s. 122.

#### *DELEGATION OF AUTHORITY — Idem.*

121. (1) The Minister or the Deputy Minister, as the case may be, may authorize such persons employed in the public service of Canada as the Minister or Deputy Minister deems proper to exercise any of the powers and perform any of the duties and functions that may be or are required to be exercised or performed by the Minister or Deputy Minister, as the case may be, under this Act or the regulations, other than the powers, duties and functions referred to in subsection 9(5), paragraphs 19(1)(c.2), (f), (k) and (l) and (2)(a.1) and 27(1)(a.3), subsections 39(2), 40(1) and 40.1(1), subparagraph 46.01(1)(e)(ii), paragraph 53(1)(b) and subsections 81(2) and 82(1).

(2) Any power exercised or duty or function performed under subsection

(1) by any person authorized to exercise or perform it shall be deemed to have been exercised or performed by the Minister or Deputy Minister, as the case may be. 1976-77, c. 52, s. 123; 1984, c. 21, s. 86; R.S.C. 1985 (4th Supp.), c. 28, s. 32; c. 29, s. 16; 1992, c. 1, s. 78; 1992, c. 49, s. 107.

*Keram v. Canada (Min. of Employment & Immigration)* (1986), 72 N.R. 250 (Fed. C.A.).

The appellant, who was the subject of a removal order, had been denied Ministerial consent to return to Canada by an immigration official in New Delhi, India. This appeal from the decision of the Immigration Appeal Board was dismissed. Section 123 of the Immigration Act permits the Minister to delegate not only the power to consent but, also, the power to withhold consent.

*Beeston v. Min. of Employment & Immigration* (1982), 132 D.L.R. (3d) 766, 41 N.R. 260 (Fed. C.A.).

The applicant applied for adjournment so that his request for a Minister's permit could be dealt with directly by the Minister of Employment and Immigration. The adjournment was refused because the manager of the immigration centre in Vancouver had already refused, on behalf of the Minister, the request for issuance of a Minister's permit. Because this authority had been delegated pursuant to the provisions of section 123 of the Act, it was held that the adjudicator was correct in refusing the request for an adjournment.

### Transitional

#### DEEMED DATE OF LANDING.

122. Where a person has been granted landing pursuant to an application made under subsection 124(1) of the *Immigration Act*, 1976, chapter 52 of the Statutes of Canada, 1976-77, that person shall, for the purpose of the *Citizenship Act*, be deemed to have been granted landing on the earlier of the day on which he came into Canada under the authority of the permit referred to in that subsection, or, where he is and has been in Canada under the authority of such a permit for a continuous period of time in excess of twelve months, the first day of that continuous period of time. 1976-77, c. 52, s. 124.

#### DEPORTATION, EFFECT OF FORMER ACT.

123. Where a person acquired Canadian domicile in accordance with the *Immigration Act*, chapter I-2 of the Revised Statutes of Canada, 1970, and did not lose Canadian domicile before April 10, 1978, a deportation order may not be made against that person on the basis of any activity, carried on by him before that date, for which a deportation order could not have been made against him under that Act. 1976-77, c. 52, s. 127.

## SCHEDULE

*(Subsection 2(1))*SECTIONS E AND F OF ARTICLE 1 OF  
THE UNITED NATIONS  
CONVENTION RELATING TO THE  
STATUS OF REFUGEES

**E.** This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

**F.** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. R.S.C. 1985 (4th Supp.), c. 28, s. 34.

*Cardenas v. Canada (Min. of Employment & Immigration)* (1994), 74 F.T.R. 214.

The applicant was unsuccessful in his claim for refugee status because he was found to have been an accomplice to crimes against humanity. The applicant was from Chile and had an association with the political faction, the Manuel Rodriguez Patriotic Front. In quashing the Board's decision, the Court noted that the Board had made little effort to link the applicant to specific criminal activities. Rather, it chose to refer only in general terms to shootings and bombings. The Board should have endeavoured to carefully detail the criminal acts which it considered the applicant to have committed.

The Board's decision was quashed on this and other grounds.

## Transitional Provisions

*S.C. 1992, c. 49, ss. 108-121**Plan for 1993*

**108.** Notwithstanding subsection 7(1) of the *Immigration Act*, as enacted by this Act, the Minister may table the immigration plan for 1993 at any time during that year.

*Provisions apply*

**109.** Subject to sections 110 to 120, every provision of the *Immigration Act*



as enacted by this Act shall, on the coming into force of that provision, apply in respect of every application, proceeding or matter under that Act or the regulations made thereunder that is pending or in progress immediately before the coming into force of that provision.

### *Inquiries and hearings*

110. Any inquiry or hearing under any provision of the *Immigration Act* amended or repealed by this Act that was commenced before the coming into force of the amendment or repeal shall continue to a determination as though that provision had not been amended or repealed.

### *Determination by senior immigration officer*

111. Where, immediately before the day this section comes into force, a direction for an inquiry had been made under subsection 23(4) or section 27 of the *Immigration Act* and the inquiry had not commenced as of that day, the matter shall be referred to a senior immigration officer who is authorized to make a determination under paragraph 23(4)(b) or subsection 27(4) of the *Immigration Act*, as enacted by this Act.

### *Credible basis and removal orders*

112. Notwithstanding section 110,

- (a) every claim to be a Convention refugee made between January 1, 1989 and the day on which this section comes into force, and in respect of which no determination of credible basis had been made as of that day, shall be referred to the Refugee Division; and
- (b) any order, including any removal order or conditional deportation order, made as a result of any inquiry or hearing referred to in that section shall be made on the basis of the provisions of the *Immigration Act* in force on the day the order is made.

### *Departure notice deemed to be departure order*

113. A departure notice issued to a person before the day this section comes into force shall be deemed to be a deportation order on the later of the expiration of

- (a) ninety days after the day this section comes into force; and
- (b) the period specified in the departure notice for the person to leave Canada.

### *Applications for leave*

114. Any application for leave to commence an application for judicial review

and any application for leave to appeal made pursuant to section 82.1, 82.3 or 83, as the case may be, of the *Immigration Act*, as those sections read immediately before the coming into force of section 73 of this Act, and in respect of which no decision was made on that date, shall be disposed of by the Federal Court — Trial Division in accordance with sections 82.1 to 84 of that Act, as enacted by section 73 of this Act, and all such applications for leave shall be deemed to be applications for leave to commence an application for judicial review.

### *Idem*

115. Where an application for leave to commence an application for judicial review or an application for leave to appeal was made pursuant to section 82.1, 82.3 or 83, as the case may be, of the *Immigration Act* before the day section 73 of this Act comes into force and leave was granted in respect thereof but the application for judicial review, or the appeal, had not been commenced as of that day, then

- (a) if leave was granted within fifteen days before the coming into force of section 73, the application shall be deemed to be an application to commence an application for judicial review made under section 82.1 of the *Immigration Act*, as enacted by section 73 of this Act, for which leave was granted and the Chief Justice of the Federal Court, or a judge of that Court designated by the Chief Justice for the purposes of this section, shall fix the day and place for the hearing of the application for judicial review; and
- (b) if leave was granted at any time before those fifteen days, the Chief Justice of the Federal Court, or a judge of that Court designated by the Chief Justice for the purposes of this section, may on application therefor, if the Chief Justice or the other judge considers there are special reasons for doing so, direct that the application shall be deemed to be an application to commence an application for judicial review made under section 82.1 of the *Immigration Act*, as enacted by section 73 of this Act, for which leave was granted and, where such a direction is made, the Chief Justice, or the other judge, shall fix the day and place for the hearing of the application for judicial review.

### *Appeals, etc.*

116. Any application for judicial review and any appeal that was commenced pursuant to section 82.1, 82.3 or 83, as the case may be, of the *Immigration Act*, as that section read immediately before the coming into force of section 73 of this Act, and that had not been set down for hearing before that date, shall be heard by the Federal Court — Trial Division in accordance with sections 82.1 to 84 of that Act, as enacted by section 73 of this Act, and all such appeals shall be deemed to be applications for judicial review.

*Idem*

117. Any application for judicial review and any appeal pursuant to section 82.1, 82.3 or 83, as the case may be, of the *Immigration Act*, as that section read immediately before the coming into force of section 73 of this Act, that had been set down for hearing before that date and for which no decision had been rendered before that date, shall be heard by the Federal Court of Appeal as though section 73 of this Act had not come into force.

*Direction of Chief Justice*

118. The Chief Justice of the Federal Court may direct that section 114, 115, 116 or 117, as the case may be, shall not apply in respect of any application or appeal if the Chief Justice considers it to be in the interest of the administration of justice to do so, and where the Chief Justice so directs, the Chief Justice shall indicate in the direction how the application or appeal shall be heard and disposed of.

*Financial liability*

119. The financial liability of a person under any provision of the *Immigration Act* amended by this Act that arises from any act or omission done before the coming into force of the amendment to that provision shall be determined as though the amendment were not in force.

*Barristers and solicitors*

120. Any barrister or solicitor designated to represent a person in accordance with subsection 30(2) or (3) of the *Immigration Act*, as that subsection read before the coming into force of section 19 of this Act, may continue to represent those persons, at the Minister's expense, as though the *Immigration Act* had not been amended by this Act.

*Persons continue to hold office*

121. Every person who immediately before the coming into force of section 63.3 of the *Immigration Act*, as enacted by this Act, was appointed or employed under the *Public Service Employment Act* in any capacity in that portion of the Canada Employment and Immigration Commission known as the Adjudication Branch shall continue to hold office in that capacity in the Adjudication Division of the Immigration and Refugee Board.



# Immigration Regulations, 1978

## SOR/78-172

Am. SOR/78-316; SOR/78-624; SOR/78-744; SOR/78-745; SOR/78-938;  
SOR/79-51; SOR/79-167; SOR/79-240; SOR/79-347; SOR/79-392; SOR/79-686; SOR/  
79-851; SOR/80-21; SOR/80-601; SOR/80-763; SOR/80-779; SOR/81-4; SOR/81-461;  
SOR/81-612; SOR/81-624; SOR/81-720; SOR/81-822; SOR/81-869; SOR/81-954; SOR/  
82-593; SOR/82-613; SOR/82-636; SOR/82-702; SOR/82-723; SOR/83-36; SOR/83-  
339; SOR/83-540; SOR/83-675; SOR/83-696;  
SOR/83-836; SOR/83-837; SOR/83-902; SOR/84-140; SOR/84-211; SOR/84-215;  
SOR/84-216; SOR/84-245; SOR/84-809; SOR/84-849; SOR/84-850;  
SOR/85-131; SOR/85-225; SOR/85-1038; SOR/85-1081; SOR/85-1085; SOR/85-1107;  
SOR/86-109; SOR/86-196; SOR/86-472; SOR/86-703; SOR/86-769;  
SOR/86-865; SOR/86-1053; SOR/86-1119; SOR/87-47; SOR/87-115; SOR/87-393;  
SOR/87-573; SOR/87-585; SOR/87-594; SOR/87-697; SOR/88-37;  
SOR/88-111; SOR/88-127; SOR/88-143; SOR/88-180; SOR/88-207; SOR/88-286; SOR/  
88-469; SOR/88-517; SOR/88-537; SOR/88-589; SOR/88-597; SOR/88-653; SOR/89-  
38; SOR/89-42; SOR/89-80; SOR/89-129; SOR/89-168; SOR/89-245; SOR/89-411;  
SOR/89-585; SOR/90-202; SOR/90-215; SOR/90-455;  
SOR/90-456; SOR/90-605; SOR/90-750; SOR/91-156; SOR/91-157; SOR/91-322; SOR/  
91-323; SOR/91-422; SOR/91-433; SOR/91-497; SOR/92-14; SOR/92-101; SOR/92-  
133; SOR/92-194; SOR/92-214; SOR/92-234; SOR/92-290; SOR/93-15; SOR/93-44;  
SOR/93-224; SOR/93-225; SOR/93-412; SOR/93-609; SOR/94-22; SOR/94-131; SOR/  
94-242; SOR/94-318.

### REGULATIONS RESPECTING ADMISSION AND REMOVAL FROM CANADA OF PERSONS WHO ARE NOT CANADIAN CITIZENS

#### Short Title

1. These Regulations may be cited as the *Immigration Regulations, 1978*.

#### Interpretation

2. (1) In these Regulations,

“accompanying dependant”, with respect to a person, means a dependant of that person to whom a visa is issued at the time a visa is issued to that person for the purpose of enabling the dependant to accompany or follow that person to Canada;

“Act” means the *Immigration Act*;

“active business operations” means business operations that create or continue employment for Canadian citizens or permanent residents and that actively

foster the development of a strong and viable economy and regional prosperity in Canada;

“administration fee” means an administration fee that is assessed pursuant to subsection 91.1(1) of the Act and that represents a portion of the total average costs incurred by Her Majesty in respect of persons referred to in paragraphs 91.1(1)(a) and (b) of the Act, including costs related to

- (a) examinations,
- (b) the first 72 hours of detention of persons under the Act,
- (c) inquiries,
- (d) investigations respecting deserters, stowaways and persons who elude examination,
- (e) fingerprinting and photographing and checks of national and international police and government records,
- (f) the use of interpreters, and
- (g) hearings before the Board;

“admissibility loan” means a loan made to a person to enable that person to meet the cost of medical services necessary in order to establish that he and his dependants are not members of the class of persons described in paragraph 19(1)(a) of the Act;

“adopted” means a person who is adopted in accordance with the laws of a province or of a country other than Canada or any political subdivision thereof, where the adoption creates a genuine relationship of parent and child, but does not include a person who is adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person’s relatives;

“approved business” means an eligible business that is approved by the Minister pursuant to subsection 6.12(3);

“approved fund” means a fund that is approved by the Minister pursuant to subsection 6.12(3);

“artificial transaction” means a transaction the purpose of which is to circumvent, directly or indirectly, the requirements of sections 6.12 to 6.19;

“assistance loan” means a loan to enable the person to whom it is made to pay his reasonable living expenses, including those of his dependants in Canada and any expenses incurred or to be incurred by him and his dependants in Canada for medical care or medical insurance or that are reasonably necessary to enable the person to engage or continue in employment;

“assisted relative” means a relative, other than a member of the family class, who is an immigrant and is an uncle or aunt, a brother or sister, a son or daughter, a nephew or niece or a grandson or granddaughter of a Canadian

citizen or permanent resident who is at least 19 years of age and who resides in Canada;

“aunt”, with respect to any person, means a sister of the father or mother of that person;

“brother”, with respect to any person, means a son of the father or mother of that person;

“Canadian controlled”, in respect of an eligible business or a fund, means an eligible business or a fund that is not managed or controlled directly or indirectly by one or more persons who are not ordinarily resident in Canada;

“Canadian financial institution” means a Canadian financial institution, as defined in section 2 of the *Bank Act*, or a subsidiary thereof;

“case presenting officer” means an immigration officer who represents the Minister at hearings held pursuant to subsection 44(3) of the Act, as amended by S.C. 1988, c. 35, section 14, or at inquiries;

“Convention refugee seeking resettlement” means a Convention refugee who has not become permanently resettled and is unlikely to be voluntarily repatriated or locally resettled;

“daughter” means, with respect to a person, a female

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age;

“dependant”, means,

(a) with respect to a person who applies for a loan referred to in section 45,

(i) the spouse of that person,

(ii) any son or daughter of that person or of the spouse of that person, where the son or daughter is less than 19 years of age and unmarried at the time the son’s or daughter’s application for an immigrant visa is received by an immigration officer, and

(iii) any son or daughter of a son or daughter referred to in subparagraph (ii), where the son or daughter is less than 19 years of age and unmarried at the time the son’s or daughter’s application for an immigrant visa is received by an immigration officer,

(b) with respect to a person referred to in subsection 6(3), a son or daughter of that person, where the son or daughter is less than 19 years of age and unmarried, or



(c) with respect to a person other than a person referred to in paragraph (a) or (b)

- (i) the spouse of that person,
- (ii) any dependent son or dependent daughter of that person or of the spouse of that person, and
- (iii) any dependent son or dependent daughter of a son or daughter referred to in subparagraph (ii);

(d) [Revoked SOR/93-412.]

“dependent daughter” means a daughter who

- (a) is less than 19 years of age and unmarried,
- (b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or

(c) is wholly or substantially financially supported by her parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability;

“dependent son” means a son who

(a) is less than 19 years of age and unmarried,

(b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of his marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by his parents since attaining 19 years of age or, if married before 19 years of age, the time of his marriage, or

(c) is wholly or substantially financially supported by his parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting himself by reason of such disability;

“designated field of study” means a field of study that has been designated by the Minister, after review of the field of study and after consultation with the governments of the provinces, as being a field of study that, when followed by an immigrant, would not give the immigrant an education profile that would enhance the immigrant’s employability;

“designated institution” means a secondary school, college, university, trade school or other institution that has been designated by the Minister, after consultation with the foreign government of the country in which the institution operates or with representatives of Canadian educational authorities, as an institution that does not conform to the educational standards or practices of the jurisdiction in which the institution operates;

“designated occupation” means an occupation in a locality or area in Canada designated by the Minister, after consultation with the relevant provincial authority, as a locality or area in which workers in that occupation are in short supply;

“eligible business” means a business that is operated in Canada, the total assets of which, including the assets of all corporations that are associated with the business, within the meaning of section 256 of the *Income Tax Act* with respect to an investor other than an investor in a province, or within the meaning of the income tax laws of the province of investment with respect to an investor in a province, do not exceed \$35,000,000, as calculated without subtracting from those total assets the liabilities of the business or the associated corporations, on one of the following days, namely,

(a) with respect to an investor other than an investor in a province,

(i) in the case of a business, the day on which the province of investment gives notice to the Minister of its approval of the business, and

(ii) in the case of a fund that was approved by the Minister before August 9, 1993 or that is an approved fund, the day on which the fund invests all or part of the minimum investment in the business, and

(b) with respect to an investor in a province, the day fixed by the laws of the province of investment;

“employment authorization” means a document issued by an immigration

officer whereby the person to whom it is issued is authorized to engage or continue in employment in Canada;

“entrepreneur” means an immigrant

(a) who intends and has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a significant contribution to the economy and whereby employment opportunities will be created or continued in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his dependants, and

(b) who intends and has the ability to provide active and on going participation in the management of the business or commercial venture;

“escrow agent”, in respect of an approved business or fund, means

(a) a bank, as defined in section 2 of the *Bank Act*, or a subsidiary of a bank set out in Schedule I to that Act, or

(b) any other Canadian financial institution, or any Canadian law firm that may, under the laws of Canada or a province,

receive and hold securities or money pursuant to an escrow agreement;

“father” means

(a) with respect to any person who has not been adopted, the male of whom that person is the issue, and

(b) with respect to any person who has been adopted, the male who has adopted that person;

“fiancée” includes a fiancé;

“final disposition”, in respect of an investor other than an investor in a province, means a disposition whereby the investor’s minimum holding period has ended and

(a) the investor’s minimum investment has been dealt with in accordance with the offering memorandum of the approved business or fund, or

(b) another settlement has been accepted by the investor;

“financial statements” means financial statements that are in accordance with generally accepted accounting principles, as recommended in the *Handbook of the Canadian Institute of Chartered Accountants*;

“fund” means a privately administered venture capital fund or a government-administered venture capital fund;

“fund manager”, in respect of a fund, means a person who controls the fund or who has direct or indirect influence on the fund deriving from a franchise, licence, lease, sales or marketing, supply or management agreement or a similar



agreement, the main purpose of which is to govern the relationship between the fund and the person respecting the manner in which the business activities of the fund are to be carried out;

“government-administered venture capital fund” means a corporation that is controlled by the government of a province or by the Government of Canada and that operates in Canada, the purpose of which is to invest in the active business operations of at least two eligible businesses;

“granddaughter”, with respect to any person, means a daughter of a daughter or son of that person;

“grandfather”, with respect to any person, means the father of the father or mother of that person;

“grandmother”, with respect to any person, means the mother of the mother or father of that person;

“grandson”, with respect to any person, means a son of a son or daughter of that person;

“guarantee” includes, in respect of an investment, any contractual obligation that, in substance and without regard to form, is a warranty, indemnity, undertaking or other guarantee that is given or made, by a third party, directly or indirectly, to or for the benefit of the investor in respect of

- (a) the payment, or default in payment, of a return on the investment, or
- (b) the repayment, or default in repayment, of all or part of the investment;

“investor” means an immigrant who

- (a) has successfully operated, controlled or directed a business,
- (b) has made a minimum investment since the date of the investor’s application for an immigrant visa as an investor, and
- (c) has a net worth, accumulated by the immigrant’s own endeavours,
  - (i) where the immigrant makes an investment referred to in subparagraph (a)(i) or (ii), (b)(i), (c)(i) or (ii) (d)(i) or (ii) or (e)(i) or (ii) of the definition “minimum investment”, of at least \$500,000, or
  - (ii) where the immigrant makes an investment referred to in subparagraph (a)(iii), (b)(ii), (c)(iii), (d)(iii) or (e)(iii) of the definition “minimum investment”, of at least \$700,000;

“investor in a province” means an investor whose minimum investment provides capital to an eligible business that is operated in a province of investment, the government of which has, pursuant to section 108(2) of the Act, entered into an agreement with the Minister in respect of the selection of immigrant investors;

“live-in caregiver” means a person who provides, without supervision, in a

private household in Canada in which the person resides, child care, senior home support care or care of the disabled;

“marriage” means the matrimony recognized as a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person;

“material fact”, in respect of an eligible business or a fund, means a fact that

(a) could reasonably be expected to influence an investor’s decision to purchase the securities offered in the offering memorandum of the business or fund, or

(b) significantly affects, or could reasonably be expected to significantly affect, the value of the securities offered in the offering memorandum of the business or fund;

“member of the family class”, which respect to any sponsor, means

(a) the sponsor’s spouse,

(b) the sponsor’s dependent son or dependent daughter,

(c) the sponsor’s father or mother,

(d) the sponsor’s grandfather or grandmother,

(e) the sponsor’s brother, sister, nephew, niece, grandson or granddaughter, who is an orphan and is under 19 years of age and unmarried,

(f) the sponsor’s fiancée,

(g) any child under 19 years of age whom the sponsor intends to adopt and who is

(i) an orphan,

(ii) an abandoned child whose parents cannot be identified,

(iii) a child born outside of marriage who has been placed with a child welfare authority for adoption,

(iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption, or

(v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, or

(h) one relative regardless of the age or relationship of the relative to the sponsor, where the sponsor does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew or niece

(i) who is a Canadian citizen,

(ii) who is a permanent resident, or

(iii) whose application for landing the sponsor may otherwise sponsor;

“member of the live-in caregivers in Canada class” means an immigrant who

(a) is in Canada as a live-in caregiver and who

- (i) has submitted the immigrant's initial application for an employment authorization as a live-in caregiver to a visa office,
- (ii) is in possession of a valid and subsisting employment authorization to work as a live-in caregiver,
- (iii) has completed a total of two years of full-time employment in Canada as a live-in caregiver within three years after being admitted to Canada, and
- (iv) is not, or whose dependants are not, the subject of an inquiry under the Act or of an appeal or application for judicial review following an inquiry under the Act, or

(b) is in Canada as a foreign domestic under the Foreign Domestic Program and who

- (i) is in possession of a valid and subsisting employment authorization to work as a foreign domestic,
- (ii) has completed a total of two years of full-time employment in Canada as a foreign domestic within three years after being admitted to Canada, and
- (iii) is not, or whose dependants are not, the subject of an inquiry under the Act or of an appeal or application for judicial review following an inquiry under the Act; (*aide familial résidant au Canada*)

“member of the post-determination refugee claimants in Canada class” means an immigrant in Canada

(a) who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee, other than an immigrant

- (i) who has withdrawn the immigrant's claim to be a Convention refugee,
- (ii) whom the Refugee Division has declared to have abandoned a claim to be a Convention refugee, pursuant to subsection 69.1(6) of the Act,
- (iii) whom the Refugee Division has determined does not have a credible basis for the claim, pursuant to subsection 69.1(9.1) of the Act, or
- (iv) who has left Canada at any time after it was determined that the immigrant is not a Convention refugee,

(b) who has not previously been refused landing by an immigration officer pursuant to section 11.4, and

(c) who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country,

- (i) to the immigrant's life, other than a risk to the immigrant's life that



is caused by the inability of that country to provide adequate health or medical care,

(ii) of extreme sanctions against the immigrant, or

(iii) of inhumane treatment of the immigrant;

“minimum holding period”, in respect of an investor, means a holding period of five years in the aggregate that begins

(a) in the case of an investment in an approved business, on the day on which all of the minimum investment of the investor is invested in the active business operations of the approved business, but does not include any period during which less than 100 per cent of the minimum investment is maintained in the active business operations of the approved business, and

(b) in the case of an investment in an approved fund, on the day on which at least 70 per cent of the minimum investment of the investor is invested by the fund in the active business operations of an eligible business, but does not include any period during which less than 70 per cent of the minimum investment is maintained in the active business operations of the eligible business;

“minimum investment” means a capital investment that will create or continue employment for Canadian citizens or permanent residents, other than the investor and the investor’s dependants, and that is made in a province

(a) by an investor other than an investor in a province, in accordance with an offering memorandum, before December 7, 1990 in an eligible business or a fund, or on or after December 7, 1990 in an eligible business or a fund that was approved by the province of investment before August 18, 1990 and that was approved by the Minister, which investment is

(i) an amount of at least \$150,000 that

(A) is invested in a province that was the destination indicated on the immigrant visas of less than three per cent of the aggregate of those persons who were granted landing as entrepreneurs, investors and self-employed persons in the calendar year prior to April 1 preceding

(I) in the case of an investment that is made directly in an eligible business or that is made in a privately administered venture capital fund, the day on which the province of investment gave notice to the Minister of its approval of the eligible business or fund, and

(II) in the case of an investment in a government-administered venture capital fund, the day on which the province of investment submitted the investment proposal to the Minister,

(B) is not subject to a guarantee,

(C) is not an investment in respect of which the eligible business or fund pledges property of a fixed value as security, and

- (D) is not refundable for a period of at least three years, starting on the day on which it is released from escrow to the eligible business or fund,
- (ii) an amount of at least \$250,000 that
- (A) is not subject to a guarantee,
  - (B) is not an investment in respect of which the eligible business or fund pledges property of a fixed value as security, and
  - (C) is not refundable for a period of at least three years, starting on the day on which it is released from escrow to the eligible business or fund, or
- (iii) an amount of at least \$500,000 that is not refundable for a period of at least five years, starting on the day on which it is released from escrow to the eligible business or fund,
- (b) by an investor in a province, in accordance with an investment proposal, on or before December 31, 1992 in an eligible business, which investment is
- (i) an amount of at least \$250,000 that
- (A) is not subject to a guarantee,
  - (B) is not an investment in respect of which the eligible business pledges property of a fixed value as security, and
  - (C) is not refundable for a period of at least three years, starting on the day fixed under the laws of the province of investment, or
- (ii) an amount of at least \$500,000 that is not refundable for a period of at least five years, starting on the day fixed under the laws of the province of investment,
- (c) by an investor other than an investor in a province, in accordance with an offering memorandum, on or after December 7, 1990 in an eligible business or a fund that was approved by the province of investment on or after August 18, 1990 and that was approved by the Minister before August 9, 1993, which investment is
- (i) an amount of at least \$250,000 that
- (A) is invested in a province that was the destination indicated on the immigrant visas of less than 10 per cent of the aggregate of those persons who were granted landing as entrepreneurs, investors and self-employed persons in the calendar year prior to April 1 preceding the day on which the Minister approved the eligible business or fund,
  - (B) is not subject to a guarantee,
  - (C) is not an investment in respect of which the eligible business or fund pledges property of a fixed value as security, and

(D) is not refundable for a period of at least five years, starting on the day on which it is invested in the active business operations of an eligible business, and is maintained in the active business operations of an eligible business for that period,

(ii) an amount of at least \$350,000 that

(A) is not subject to a guarantee,

(B) is not an investment in respect of which the eligible business or fund pledges property of a fixed value as security, and

(C) is not refundable for a period of at least five years, starting on the day on which it is invested in the active business operations of an eligible business, and is maintained in the active business operations of an eligible business for that period, or

(iii) an amount of at least \$500,000 that is not refundable for a period of at least five years, starting on the day on which it is invested in the active business operations of an eligible business, and that is maintained in the active business operations of an eligible business for that period,

(d) by an investor other than an investor in a province, in accordance with an offering memorandum, on or after August 9, 1992 in an approved business or fund, which investment is

(i) an amount of at least \$250,000 that

(A) is invested in a province that was the destination indicated on the immigrant visas of less than 10 per cent of the aggregate of those persons who were granted landing as entrepreneurs, investors and self-employed persons in the calendar year prior to April 1 preceding the day on which the Minister approved the business or fund,

(B) is not subject to a guarantee,

(C) is not an investment in respect of which the business or fund pledges property of a fixed value as security, and

(D) is not refundable for the period determined under paragraph 6.14(1)(h),

(ii) an amount of at least \$350,000 that

(A) is not subject to a guarantee,

(B) is not an investment in respect of which the business or fund pledges property of a fixed value as security, and

(C) is not refundable for the period determined under paragraph 6.14(1)(h), or

(iii) an amount of at least \$500,000 that is not refundable for the period determined under paragraph 6.14(1)(h), or



(e) by an investor in a province, in accordance with an investment proposal, after December 31, 1992 in an eligible business, which investment is

(i) an amount of at least \$250,000 that

(A) is invested in a province that was the destination indicated on the immigrant visas of less than 10 per cent of the aggregate of those persons who were granted landing as entrepreneurs, investors and self-employed persons in the calendar year prior to April 1 preceding the day on which the investment was made,

(B) is not subject to a guarantee,

(C) is not an investment in respect of which the eligible business pledges property of a fixed value as security, and

(D) is not refundable for a period of at least five years, starting on the day fixed under the laws of the province of investment,

(ii) an amount of at least \$350,000 that

(A) is not subject to a guarantee,

(B) is not an investment in respect of which the eligible business pledges property of a fixed value as security, and

(C) is not refundable for a period of at least five years, starting on the day fixed under the laws of the province of investment, or

(iii) an amount of at least \$500,000 that is not refundable for a period of at least five years, starting on the day fixed under the laws of the province of investment;

“mother” means

(a) with respect to any person who has not been adopted, the female of whom that person is the issue, and

(b) with respect to any person who has been adopted, the female who adopted that person;

“National Employment Service” means the employment service referred to in Part VII of the *Unemployment Insurance Act 1971*;

“nephew”, with respect to any person, means a son of a brother or sister of that person;

“niece”, with respect to any person, means a daughter of a sister or brother of that person;

“offering memorandum”, in respect of an approved business or fund, means an offering memorandum that meets the requirements of paragraph 6.12(4)(a);

“offering period” means the period that begins on the day on which an eligible business or a fund is approved by the Minister and ends on the day set out

on the front cover page of the offering memorandum as the date on which the offering expires;

“ordinarily resident” has the same meaning as in subsections 250(1) and (3) of the *Income Tax Act*;

“orphan” means a person whose father and mother are both deceased;

“person concerned” means

(a) with respect to an inquiry, the person who is the subject of the inquiry and includes any member of that person’s family who may be included in any deportation order or conditional deportation order made against that person or in any departure order or conditional departure order issued to that person, and

(b) with respect to a hearing held pursuant to subsection 44(3) of the Act, as amended by S.C. 1988, c. 35, section 14, the person who is the subject of the hearing;

“privately administered venture capital fund” means a corporation that is not controlled by a government and that operates in Canada, the purpose of which is to invest in the active business operations of at least two eligible businesses within a province;

“provincial nominee” means an immigrant whose admission is considered, pursuant to an agreement under section 109 of the Act between the Minister and the government of the province to which the immigrant intends to proceed, to be of significant benefit to the industrial development of that province;

“related person” means a person who

(a) manages or controls, is a director of, or owns, directly or indirectly, more than 10 per cent in the aggregate of the voting securities of an eligible business or a fund, or of an approved business or fund or a fund manager, or

(b) manages or controls, is a director of, or owns, directly or indirectly, more than 10 per cent in the aggregate of the voting securities of

(i) an eligible business or a fund or a fund manager, and

(ii) any approved business or fund or the fund manager of any approved fund;

“self-employed person” means an immigrant who intends and has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the cultural or artistic life of Canada;

“sister”, with respect to any person, means a daughter of the mother or father of that person;

“son” means, with respect to a person, a male

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age;

“sponsor” means a Canadian citizen or permanent resident who is at least 19 years of age, who resides in Canada and who sponsors an application for landing;

“spouse”, with respect to any person, means the party of the opposite sex to whom that person is joined in marriage;

“student authorization” means a document issued by an immigration officer whereby the person to whom it is issued is authorized

(a) to attend a university or college authorized by statute or charter to confer degrees, or

(b) to take an academic, professional or vocational training course at a university, college or other institution not described in paragraph (a);

“transportation loan” means a loan to enable the person to whom it is made to obtain transportation for himself or his dependants or both to the place of final destination in Canada and to pay the reasonable living expenses necessarily incurred during the course of the journey;

“uncle”, with respect to any person, means a brother of the father or mother of that person;

“undertaking” means

(a) for the purposes of subparagraph 6(1)(b)(i),

(i) where the Minister has, pursuant to section 108 of the Act, entered into an agreement with the government of the province in which the member of the family class intends to reside, an undertaking in writing that is required by the laws of that province and that is given to that government by a person residing in that province, to assist the member of the family class and the member’s dependants in becoming successfully established in Canada for a period not exceeding ten years, as determined by an official who is designated by the government of that province or pursuant to the laws of that province, or

(ii) in any other case, an undertaking in writing given to the Minister to make provision for the lodging, care and support of a member of the family class and the member’s dependants for a period not exceeding ten years, as determined by an immigration officer, and

(b) for the purposes of paragraph 10(1.1)(c),

(i) where the Minister has, pursuant to section 108 of the Act, entered



into an agreement with the government of the province in which the assisted relative intends to reside, an undertaking in writing that is required by the laws of that province and that is given to that government by a person residing in that province to assist the assisted relative and the assisted relative's dependants in becoming successfully established in Canada for a period of five years, or

(ii) in any other case, an undertaking in writing given to the Minister to make provision for the lodging, care and support of the assisted relative and the assisted relative's dependants for a period of five years.

(2) For the purpose of paragraph 19(2)(c) of the Act, "family" with respect to any visitor includes any accompanying relative who is dependent on that visitor or on whom that visitor is dependent for support.

(3) For the purpose of paragraph 27(1)(f) of the Act, "family" with respect to any person includes those persons who were granted admission as members of the family class or assisted relatives of that person.

(3.1) For the purposes of subsection 29(3) and 69(2) of the Act, as amended by S.C. 1988, c. 35, section 18, "family", with respect to the person who is the subject of the inquiry or proceedings, includes any relative of that person.

(4) For the purposes of subsection 33(1) of the Act, "family" includes any relative who is dependent for support on the member of the family

(a) against whom a deportation order or conditional deportation order is or may be made; or

(b) to whom a departure order or conditional departure order is or may be issued.

(5) For the purposes of the definition "eligible business" in subsection (1), inter-company investments between associated corporations may be eliminated when aggregating gross assets of the business.

(5.1) For the purposes of the definition "eligible business" in subsection (1) and section 6.12,

(a) a corporation that is associated with the business includes a partnership or joint venture that is associated with that business, and a partnership or joint venture that is associated with another partnership or joint venture or with a corporation, if they are associated in a manner similar to the manner in which corporations are associated within the meaning of section 256 of the *Income Tax Act* with respect to an investor other than an investor in a province, or the income tax laws of the province of investment with respect to an investor in a province; and

(b) where two or more corporations are acting together directly or indirectly in a business, the resulting business shall not be considered to be an eligible

business unless the total assets of one group of corporations, including associated corporations, that controls the business do not exceed \$35,000,000.

(5.2) For the purposes of the definition “minimum investment” in subsection (1), notwithstanding clauses (a)(i)(D) and (ii)(C), subparagraph (a)(iii), clause (b)(i)(C), subparagraph (b)(ii), clauses (c)(i)(D) and (ii)(C), subparagraph (c)(iii), clauses (d)(i)(D) and (ii)(C), subparagraph (d)(iii), clauses (e)(i)(D) and (ii)(C) and subparagraph (e)(iii) of that definition, all of a minimum investment is refundable if the investor’s application for an immigrant visa as an investor is refused by a visa officer.

(6) For the purposes of paragraphs (b) and (e) of the definition “minimum investment” in subsection (1), an investment includes an agreement to make an investment, where the amount to be invested is placed with a Canadian financial institution in Canada before the investor is issued an immigrant visa as an investor.

(6.1) For the purposes of calculating the minimum holding period and the period of at least five years referred to in paragraph (c) of the definition “minimum investment” in subsection (1),

(a) in the case of a business that was approved by the Minister before August 9, 1993, or an approved business, that invests the minimum investment of more than one investor in the active business operations of the business,

(i) the total amount invested in the active business operations of the business must be attributed to each investor, in the order in which the investors made their investments in the business, until the total amount has been attributed, and

(ii) in attributing the total amount invested to each investor, any investor who has withdrawn the investor’s minimum investment from the business, and any investor whose minimum investment in the active business operations of the business was maintained for the relevant period, must not be taken into consideration; and

(b) in the case of a fund that was approved by the Minister before August 9, 1993, or an approved fund, that invests in the active business operations of an eligible business,

(i) the investment of the fund must be attributed to each investor in the fund in the order in which the investors made their investments in that fund, at the rate of 70 per cent of the minimum investment made by each investor, until the total amount of the investment by the fund has been attributed, and

(ii) in attributing the investment of the fund to each investor, any investor who has withdrawn the investor’s minimum investment from the fund, and any investor whose minimum investment in the active business

operations of the business was maintained for the relevant period, must not be taken into consideration.

(6.2) For the purposes of calculating the minimum holding period and the period of at least five years referred to in paragraph (c) of the definition “minimum investment” in subsection (1), where an investment is withdrawn from the active business operations of an eligible business,

(a) the investment that is withdrawn must be attributed to each investor that invested in the eligible business or fund, in the order that is the reverse of the order in which the investors made their minimum investments,

(i) in the case of a minimum investment made in a business that was approved by the Minister before August 9, 1993 or in an approved business, at the rate of 100 per cent of the minimum investment made by each investor, until the total amount of the investment that is withdrawn has been attributed, and

(ii) in the case of a minimum investment made in a fund that was approved by the Minister before August 9, 1993 or in an approved fund, at the rate of 70 per cent of the minimum investment made by each investor, until the total amount of the investment that is withdrawn has been attributed; and

(b) in attributing the investment that is withdrawn to each investor, any investor who has withdrawn the investor’s minimum investment from the eligible business or fund, and any investor whose minimum investment in the active business operations of the eligible business was maintained for the relevant period, must not be taken into consideration.

(7) For the purposes of subparagraph (b)(i) of the definitions “dependent son” and “dependent daughter”, where a person has interrupted a program of studies for an aggregate period not exceeding one year, the person shall not be considered thereby to have failed to have continuously pursued a program of studies.

(8) For the purposes of these Regulations, a minimum offering is met when an escrow agent receives minimum investments within the offering period that in the aggregate equal the minimum offering.

(9) For the purposes of these Regulations, an investment shall not be considered to be an investment in the active business operations of an eligible business where it is

(a) made primarily for the purpose of deriving investment income, such as interest or dividends;

(b) made for the purpose of refinancing existing business operations of the eligible business; or

(c) withdrawn and attributed in accordance with subsection (6.2).



*Subsection (1)**Accompanying dependant*

*Canada (Min. of Employment & Immigration) v. De Decaro*, [1993] 2 F.C. 408, 103 D.L.R. (4th) 564, 155 N.R. 129 (C.A.).

In October 1988 a visa officer issued an immigrant visa to Ignazio De Decaro. He also issued an immigrant visa to two dependants who were to accompany Mr. De Decaro, namely the respondent and her daughter. Ignazio De Decaro died before coming to Canada. The respondent did come and arrived at Dorval on July 11, 1989 accompanied by her daughter and another child, who was born in the U.S. after Ignazio De Decaro's death and which child had never obtained a visa to Canada.

The respondent then applied for landing for herself and her two children. This was denied on the ground that the respondent's admission contravened section 19(2)(d) of the Immigration Act because the respondent did not meet the requirements of section 9(1) of the Act.

The adjudicator found that when the respondent applied for admission to Canada, she held a valid immigrant's visa since her visa had not been revoked by the proper authorities. The adjudicator found that the respondent's husband's death did not automatically invalidate the visa. Further, the adjudicator found that there was no need to refer to section 12 of the Regulations because that provision did not enact a condition of admission, consequently its infringement did not mean the respondent could not be admitted.

The Appeal Division of the I.R.B. dismissed the Minister's appeal on the basis that the respondent, before appearing at a port of entry, had duly obtained an immigrant visa which had never been revoked or cancelled by the proper authorities and thus the respondent had the right to be admitted to Canada unless she was inadmissible on some other ground than the lack of a valid visa.

The Minister's appeal to the Court of Appeal was allowed. Pratte J.A. held that the definition of "accompanying dependant" illustrated that the visa issued to a person in this class was of a very special type which was issued solely to enable its holder to accompany or follow another person to Canada. The holder of such a visa who applied for admission without the other person accompanying or preceding him or her into Canada did not therefore meet the requirements of section 9(1) of the Act.

Further, after her husband's death the respondent became inadmissible by virtue of section 12 of the Regulations. Her marital status had changed since she obtained her visa and in order to be admitted to Canada she had to establish not only that she was eligible, but also that she met all the conditions for obtaining a visa. The respondent never discharged this burden of proof.

Marceau J.A. agreed that the decision of the Appeal Division should be set aside. He saw no reference in the Act or Regulations to visas which become invalid, are revoked or become ineffective. The technique in his view used to cover cases of changes in the immigrant's status between the time the visa is issued and the time he or she arrives at the Canadian border is contained in section 12 of the Regulations. In his view, issuing an immigrant visa is not the granting of landing. Such issuance simply means that the visa officer has formed the opinion that the applicant meets the requirements of the Act and Regulations for admission to Canada. The visa is evidence of a conclusion by an immigration officer whose function is to determine from outside Canada whether

applicants are admissible and that conclusion will usually be accepted by his or her colleague at the port of entry. However, the rule is still that a foreign national arriving in Canada with a view to residing here must satisfy the immigration officer of his admissibility at the port of entry. Section 12 of the Regulations imposes on an immigrant a duty to disclose any change in the facts which may have influenced the issuing of the visa and if there has been such a change, it requires the immigrant to meet new requirements. The visa is not void, but the visa in itself does not confer the right of entry. It is the new requirements of section 12 of the Regulations that must be met.

In Marceau J.A.'s view the respondent could not establish that she met the requirements of section 12 since she was granted a visa in consideration of her husband's presence. The adjudicator accordingly was wrong to think that she met the conditions of admission set out by the Regulation and the Appeal Division could not confirm the adjudicator's finding on the ground that the Minister had not discharged the burden of proving that the respondent was inadmissible or that her visa had been cancelled, as the Minister was under no burden of proof and cancellation of a visa as a concept does not exist.

Given that the Court intended to allow the appeal, it then had to consider section 73(3). The majority was of the view that the respondent before her husband's death possessed a valid visa. However, after that death it was impossible for the condition attached to the visa to be performed so that the visa ceased to have any validity. Accordingly, section 73(3) conferred no right of appeal to the Appeal Division on the respondent.

Marceau J.A. was of the view that the respondent was in possession of a valid visa and that the matter should be returned to the Appeal Division as it was still under a duty to consider whether on compassionate or humanitarian grounds the respondent should not be removed from Canada.

### *Adopted*

*Singh v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 37, 11 Imm. L.R. (2d) 1, 116 N.R. 176 (C.A.), leave to appeal to S.C.C. refused (1991), 13 Imm. L.R. (2d) 46 (note), 131 N.R. 319 (note) (sub nom. *Brar v. Min. of Employment & Immigration*) (S.C.C.).

The appellant sought to sponsor, for admission to Canada as a permanent resident, a person whom the appellant claimed as his son by virtue of an adoption in India under the provision of the applicable Indian legislation, the Hindu Adoptions and Maintenance Act 1956. There was a registered deed of adoption produced, bearing a date substantially after the time of the alleged adoption. Section 16 of the Hindu Adoptions and Maintenance Act 1956 provides that a registered deed of adoption creates a presumption that the adoption is in compliance with the law. The Court noted that the terms "son" and "adopted" are defined in the Immigration Regulations. The question for the visa officer and the Immigration Appeal Board, in this case, was whether there had been, prior to the child's thirteenth birthday, an adoption in accordance with the laws of India which created a relationship of parent and child so as to make the adoptee the sponsor's "son". This is an issue of Canadian law. The inquiry is directed more to historical fact than to present status and the determination whether the Hindu Adoptions and Maintenance Act 1956 has been complied with is only a part of the responsibility which Canadian

legislation gives to the visa officer and the Board. Presumptions imposed by Indian law in Indian courts are of no assistance in determining if a person qualifies as an adopted son for the very special purposes of the Immigration Act and Regulations. Further, the Court noted that the presumption in section 16 was directed towards "the court" and concluded that it was procedural in nature and therefore not intended to bind Canadian courts — courts over which the Parliament of India had no jurisdiction.

*Editor's Note:* The definitions of "adopted," "daughter," and "son" have been changed, but the principles in this case may still be applicable.

*Sashi v. Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288 (Fed. T.D.).

The applicant sought to quash a decision of a visa officer in India refusing sponsorship applications for the applicant's mother and his adopted daughter. The visa officer refused to accept the sponsorship of the daughter because, as a result of his inquiries, he concluded that the provisions of the Hindu Adoptions and Maintenance Act had not been complied with. It was held that a visa officer has not only a right but a duty to ensure that all immigrants meet the requirements of the Act and Regulations. In this case, that included making certain that the sponsored child had been legally adopted within the meaning of section 2(1) of the Regulation. The officer's decision was not reached improperly or without justification. The officer did reach a conclusion that involved an interpretation of Hindu law, and he ought to have afforded the applicant some opportunity for counter-argument. However, the relief sought in this case, i.e. *certiorari* and *mandamus*, was discretionary, and in all the circumstances the motion was dismissed.

### ***Case presenting officer***

*Orelien v. Canada (Min. of Employment & Immigration)* (1991), [1992] 1 F.C. 592, 15 Imm. L.R. (2d) 1, 135 N.R. 50 (C.A.).

The power and duty of a case-presenting officer to cross-examine claimants does not impair any right accorded a refugee claimant by section 7 of the Charter or paragraph 2(e) of the Bill of Rights. The power to cross-examine cannot be isolated from other mandated attributes of the screening process, namely, an oral hearing, the right to counsel, a reasonable opportunity to present evidence, cross-examine witnesses and make representations, and finally the requirement that the tribunal give reasons for its decision if it is adverse.

*Satiacum v. Min. of Employment & Immigration* (1985), 64 N.R. 358 (Fed. C.A.).

The circumstance that the adjudicator and the case presenting officer were both public servants employed in the same department of government, without more, was not such as to give rise to a reasonable apprehension of bias. An informed person viewing the matter realistically and practically would not conclude that it was more likely than not that the adjudicator would not decide fairly.

### ***Daughter***

See summaries under subheading *Son/Daughter, infra*.



### ***Dependant***

*Moore v. Min. of Employment & Immigration*, Imm. App. Bd., Ottawa, Doc. No. 78-3016, December 6, 1978.

For the purposes of the Act and regulations, “dependant” is a term of art and includes a spouse whether or not that spouse is actually dependent for support upon the prospective immigrant.

### ***Dependant daughter/Dependant son***

*Canada (Min. of Employment & Immigration) v. Barr* (1993), 152 N.R. 157 (Fed. C.A.).

The respondent sponsored the application of her father, her mother and brother. Her brother was born on April 15, 1964. The father's (the principle applicant) application for permanent residence was received by the visa office on April 15, 1985. The determination of the brother's age was governed by section 25(9) of the Interpretation Act. The fact that the last day on which the brother was less than 21 years was a Sunday, a day on which the visa office was not opened, was of no assistance in determining the brother's age. The brother could not be said to be less than 21 years of age on the date when the application of the father was received by the visa office.

*Editor's Note:* Notwithstanding amendments to the definition of “dependent son”, and “dependent daughter”, the principle enunciated in this case may still be applicable.

### ***Entrepreneur***

*Chan v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1825, May 12, 1994.

The issue in this judicial review was whether the words “that will make a significant contribution to the Canadian economy” contained in the definition of an entrepreneur are *ultra vires*.

Section 3 of the Immigration Act sets forth the objectives of Canada's immigration policy. Paragraph (h) recognizes the need to foster the development of a strong and viable economy and the prosperity of all regions in Canada. Therefore, the regulations made by the Governor in Council and their administration must be considered having regard to Canada's immigration policy. When Parliament authorized the Governor in Council to make regulations respecting selection standards based on personal attributes and attainments, it intended that the Governor in Council have the discretion to more fully describe the personal attributes and attainments having regard to Canada's immigration policy objectives and in particular to Canada's domestic interests, including the need to foster the development of a strong and viable economy. Therefore, the words “that will make a significant contribution to the economy” are not *ultra vires* the Immigration Act.

With respect to entrepreneurs, the scheme of the Immigration Act and regulations was that a prospective immigrant was expected to represent to a visa officer the immigrant's intention and ability to establish, purchase or invest in a business or a commercial venture in Canada. When the immigrant lands, the immigration officer at

the port of entry attaches conditions to the immigrant's visa so that the representations made to the visa officer survive the landing and the immigrant can be required to fulfil them.

The assessment of whether an applicant has fulfilled the terms and conditions must concern itself with the two-year period following the applicant's landing. Whether a business will make a significant contribution to the Canadian economy or create or continue employment for Canadian citizens or permanent residents is not something that lends itself to a momentary assessment. The notion of a significant contribution to the economy with the continuation of employment are on-going circumstances and require more long-term assessment. The immigration officer must be permitted the scope to reasonably satisfy himself or herself that the business or commercial venture has and will make a significant contribution and that employment opportunities will be created in a meaningful way.

Finally, there may be many reasons for bankruptcy and bankruptcy alone would not preclude the applicant from having met the conditions attached to his landing, but these are circumstances for objective assessment by an immigration officer.

*Muliadi v. Min. of Employment & Immigration* (1986), 18 Admin. L.R. 243 (Fed. C.A.).

The appellant was a resident of Indonesia. He applied to come to Canada on the basis that he fell within the entrepreneurial category as an immigrant. His application was refused and that refusal was upheld by the Trial Division. The Court of Appeal overruled the Trial Division because the officer responsible for the disposing of the application failed to inform the appellant of the negative assessment of the appellant's business by the Province of Ontario, and to give the appellant a fair opportunity of correcting or contradicting that assessment before making the decision required by the statute. Further, the wording of the refusal and the conduct of the officer at the interview of the appellant suggested that the decision to refuse the appellant's application was, in fact, being made by the Government of Ontario official with whom the visa officer consulted about the viability of the proposal, rather than by the visa officer himself. The uncontradicted evidence indicated that the visa officer had stated that he was sympathetic to the appellant's application but had to deny the application because the Ontario Government had refused it. Finally, the appeal was allowed because the visa officer, in his letter, indicated that he had paid particular attention to whether employment opportunities for "a significant number of Canadians would be created." The language of the definition of an entrepreneur did not impose such a requirement; therefore, the visa officer exceeded his jurisdiction and, for that reason as well, his decision could not stand.

*Editors' Note:* Some of the relevant regulations, including the definition of "entrepreneur", have been amended since this case arose. The Court's analysis of the propriety of the visa officer's decision may be more important than the result of the application.

### ***Member of the family class***

*Lidder v. Canada (Min. of Employment & Immigration)* (1992), 136 N.R. 254 (Fed. C.A.).

The respondent promised his dying sister that he would take care of her children

upon her death, which occurred in 1982. He submitted an undertaking of assistance (family class) to sponsor his now orphaned nephew. At the time the respondent submitted his undertaking of assistance the nephew was 17 years of age. By the time the nephew received the application for permanent residence from the Canadian High Commission in Delhi, the nephew was already 18 years of age. The respondent was informed that the nephew's application was refused due to the fact that he was 18 years of age when his application was received.

The Court noted that there are four kinds of estoppel available: estoppel by matter of record, estoppel by deed, estoppel by representation and promissory estoppel. The branch of estoppel at issue in this case was estoppel by representation. In order for the doctrine of estoppel by representation to apply there must be the following elements:

1. a representation of fact made with the intention that it be acted upon or that a reasonable person would assume was intended to be acted upon;
2. the representee must act upon the representation; and
3. the representee must have altered his position in reliance upon the representation and thereby suffered a prejudice.

Neither the doctrine of estoppel nor the related doctrine of reasonable or legitimate expectation creates a substantive right. They are part of the rules of procedural fairness which govern administrative bodies. A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can those undertakings cause the public authority to forego the requirements of the law. The effective date of a sponsored application is the date of the filing of the application itself. At that point in time the nephew was over the age of 18 years and could not be sponsored as a member of the family class. Accordingly, the respondent had not sponsored an undertaking by a member of the family class and could not appeal to what was then the Immigration Appeal Board, and thus the Board was without jurisdiction to hear and in this case allow the respondent's appeal. Accordingly, the decision of the Board was quashed. Costs were awarded against the Crown on a solicitor and client basis.

*Canada (Min. of Employment & Immigration) v. Surinder Narwal* (1990), 10 Imm. L.R. (2d) 183, 26 R.F.L. (3d) 95 (Fed. C.A.).

The respondent landed in Canada in 1983 as a fiancée and was married. A year later, the respondent was divorced. The respondent then married her former husband's brother in England. During the period of her visit to England, a child, who was later born in Canada, was conceived. The husband returned to India after the marriage in England and filed an application for permanent residence which was sponsored by the respondent. During an interview, the applicant denied that his brother had in any way been related to the respondent. The respondent maintained regular correspondence with her new husband and visited him in India. The new husband's application for permanent residence was refused but the refusal was overturned by the Immigration Appeal Board. They decided that the validity of the marriage was governed by the law of India and that there was a custom permitting a woman to marry the brother of her former husband. The decision of the Board was based on humanitarian and compassionate grounds and the appeal was allowed on that basis. The Court observed that the Board erred in deciding that the substantial validity of the marriage was to be determined by the law of India,



because there was on the facts a reasonable probability that the family would live in Canada with their Canadian born child.

The Court held that the respondent was validly married by the law of Canada and that the Board had jurisdiction to grant relief on humanitarian and compassionate grounds. The Minister's appeal was dismissed.

This case departs from the traditional view that the law governing capacity to marry is that of the domicile of both parties at the time of the marriage.

*Canada (Min. of Employment & Immigration) v. Taggar*, [1989] 3 F.C. 576, 8 Imm. L.R. (2d) 175, 60 D.L.R. (4th) 431, 99 N.R. 321 (Fed. C.A.).

The Minister appealed from a decision of the Immigration Appeal Board allowing an appeal by the respondent from the refusal of a visa officer to grant an immigrant visa to Ranjit Taggar, an Indian citizen whom the respondent had sponsored as her husband. The respondent had married Ranjit Taggar a few months after her previous marriage to his brother had ended in divorce. Under the Hindu Marriage Act, 1955, a marriage is null and void if one of the parties was "the wife of the brother . . . of the other" unless "the custom or usage governing each of them permits of a marriage between the two." As Ranjit Taggar had no evidence of such custom, the visa officer rejected his application for a visa. Ranjit Taggar submitted a new application and this time accompanied it with a copy of a judgment of an Indian Court in an action for a declaration that he had brought against the respondent. That judgment declared the respondent and Ranjit Taggar to be legally married. The visa officer refused to issue a visa taking the view that the judgment did not establish the validity of the marriage. Customs must be clearly proved to exist and the onus of establishing them rests upon those who rely on their existence. A custom that is not established is therefore deemed not to exist. The declaratory judgment produced by the respondent's husband was a judgment "in personam" which the respondent agrees bound only the two parties to the action. The existence of a custom was not an issue in that case. The judgment, therefore, did not prove the custom, therefore, the marriage was invalid and, therefore, the Board had no jurisdiction to hear the appeal because the respondent was not married to the person whom she was seeking to sponsor and, therefore, Ranjit Taggar's application for permanent residence was not an application by a member of the family class.

*Darkwah v. Min. of Employment & Immigration* (1987), 4 Imm. L.R. (2d) 223.

This appeal from a refusal to approve the sponsored applications for landing in Canada by the sponsors, for the sisters, was allowed. The applicants submitted their own birth certificates, their brother's (sponsor) proof of birth and their parents' death certificates. The visa officer found the death certificates acceptable. He was not satisfied about the validity of the birth certificates. The birth certificates were issued prior to the sponsorship undertaking and, thus, should not have been considered self-serving. No effort was made by the visa officer to prove the birth certificates invalid or unacceptable by requesting relevant information from the competent authorities in Ghana. Failing that, the visa officer should have accepted the documents on their face value. The appeal was allowed.

*Sashi v. Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288 (Fed. T.D.).

For digest, see section 2.01, subheading *Subsection (1), Adopted, supra*.

*Rattan v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 317 (Imm. App. Bd.).

This appeal was from the refusal of a sponsored application for landing of the appellant's spouse. The sponsor was a Canadian citizen, and the only child of the marriage was Canadian born. The spouse of the appellant (the father) had left Canada voluntarily after being advised he must make his sponsored application from outside Canada. The basis for the refusal was that the marriage was not permitted by the Hindu Marriage Act, 1955 because the appellant had been previously married to the sponsoree's uncle. The Board noted that while capacity to marry is presumed to be governed by the prenuptial domicile of the parties, an exception exists where it can be inferred that at the time of the marriage the parties intended to establish their home in a certain country (Canada) and did, in fact, establish it there within a reasonable time. In such a situation, the issue is whether the marriage is valid according to the laws of Canada, which it was. Accordingly, the refusal was found to be invalid and the appeal was allowed.

*Mahida v. Canada (Min. of Employment & Immigration)* (1987), 11 F.T.R. 150 (Fed. T.D.).

On May 10, 1984, the applicant executed an undertaking of assistance to sponsor her father and her 2 brothers. A copy of the undertaking was received in New Delhi on May 24, 1984. Necessary application forms were sent on June 27, 1984. These forms were either not received or not returned. Subsequently, in March 1985 and April 1985, further application forms were forwarded to the proposed immigrants. Finally, on May 10, 1985 the forms were completed and returned to New Delhi. A brother reached the age of 21 years on February 10, 1985 and was considered to be no longer eligible for an immigrant visa as an accompanying family member. Had it not been for the failure of the proposed immigrants to receive, or their failure to return, the application forms, the application with respect to the son would have been treated in the same manner as the others, and an immigrant visa would ostensibly have been issued to him. It was held that the effective date to determine the inadmissibility of the son was the date of the undertaking of assistance and not the date when the immigration applications were duly completed. It was noted that the delays were beyond the control of both the immigration services and the proposed immigrants. There was no active or passive conduct by either of the parties for delay to impede the processing of the application.

### ***Member of the live-in caregiver in Canada class***

*Caletena v. Canada (Solicitor General)* (1994), 23 Imm. L.R. (2d) 177, 74 F.T.R. 78.

The applicant was admitted to Canada on May 5, 1989 as a member of the "Live-in Caregivers in Canada" class. Since that time she had been employed as a nanny on both a full-time and part-time basis, as a chambermaid by the Convention Inn in Edmonton and as a part-time receptionist. On May 14, 1993 her application for permanent residence was accepted subject to medical examinations. On September 27, 1993 she was informed that two of her infant children failed to pass their medical examinations. Accordingly, her application for permanent residence was refused and a voluntary departure notice was issued and her temporary employment authorization was terminated effective November 1, 1993.

Applicants under the Live-in Caregivers Program are not attempting to gain entry or remain in Canada by failing to comply with our laws. The program is designed to assist workers who are invited to enter Canada on employment authorizations. There is the implication, at least, that those administering the program will encourage and assist people, such as the applicant, to upgrade their skills and seek permanent residence. In the present case, the applicant did all that was expected of her as a foreign domestic worker. She was gainfully employed and by all accounts a highly satisfactory employee.

The applicant wished to contest the medical evidence but had not been afforded an opportunity to know what it was or to make answer to it prior to the respondent's decision of September 27, 1993. Accordingly, in view of the unique nature of the foreign domestic program, the applicant was permitted to remain in Canada and continue her employment until such time as the leave application for judicial review was perfected.

*Turingan v. Canada (Min. of Employment & Immigration)* (1993), 72 F.T.R. 316.

The applicant came to Canada from the Philippines and worked as a live-in caregiver. During most of the period she resided with her respective employers. In July, 1992, however, she began to experience sharp stomach pain associated with a previously diagnosed peptic ulcer. She found that she could relieve the pain on a diet of rice, vegetables, fish and meat while her employer's family preferred pasta dishes. Embarrassed at the prospect of imposing her diet on her employer's family, she began to have supper and stay over at her friend's apartment, returning to work the next day. The applicant's application for permanent residence was refused on the basis that she did not meet the requirements of the Live-in Caregiver Program because she had not worked as a live-in caregiver the required twenty-four months. It was conceded by counsel for the Minister that there had been a mistake in the calculation of the length of time and both parties were in agreement that the application should be allowed.

The Court noted, however, that the primary purpose of the Live-in Caregiver Program was to encourage people to come to Canada to fill a void which exists in our labour market. In consideration for their commitment to work in the domestic field, the Program's participants are virtually guaranteed permanent residence status provided that they work the required twenty-four-month period. The immigration officer, therefore, had limited discretion to refuse permanent residence status once it had been determined that the participant had worked the required twenty-four months.

The applicant had provided a credible explanation about her living arrangements during the period of her stomach illness. The Court questioned the merits of the Department taking a harsh stance in this type of application. If the Department, however, intended to adopt a strict interpretation of the Program requirements, the basic principles of fairness required that the Department inform the applicant of its conclusions and afford her an opportunity to correct her breach before compelling her to leave the country.

The purpose of the Live-in Caregiver Program is to facilitate the attainment of permanent residence status. It is therefore incumbent on the Department to adopt a flexible and constructive approach in its dealings with the Program's participants. The Department's role is not to deny permanent residence on merely technical grounds, but rather to work with, and assist the participants in reaching their goal of permanent residence status.



### *Self-employed person*

*Ho v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 38, 27 F.T.R. 241 (Fed. T.D.).

Applications for permanent residence under the self-employed provisions involve a two-stage assessment process. The first phase of the assessment involves a paper-screening process in which immigration officials evaluate documents submitted by the applicant and decide if the application process should be continued. If the applicant passes this phase, he is interviewed by a visa officer. One of the most significant factors in any assessment is the applicant's possibility of supporting himself in Canada. Points are therefore awarded for both occupational demand in the paper-screening step and in the final assessment for experience in the occupation for which the candidate is qualified and prepared to follow in Canada. Where an applicant is not awarded any units of assessment for experience, an immigrant visa cannot be issued unless the visa officer believes that there are good reasons why the number of points do not reflect the chances of the applicant to become successfully established in Canada and those reasons have been approved by a senior officer. A candidate for self-employment must be someone who intends and who has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the cultural or the artistic life of Canada. In addition, the visa officer will award 30 points of assessment to an applicant seeking to be self-employed if, in the visa officer's opinion, the applicant will be able to become successfully established in his business in Canada.

The purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation. In this case, the visa officer interpreted the regulations in such a narrow fashion as to render meeting qualifications virtually impossible and, as a result, treated the applicant unfairly. The applicant was an accomplished musician who was able to teach and, on the question of whether the applicant could be self-employed as a teacher, his only apparent failure was in the lack of actual experience. Undue emphasis was placed on the lack of experience as a result of which there was a fundamental breach of the duty of fairness. Accordingly, the application was allowed and the visa officer's decision set aside.

*Li Yang v. Canada (Min. of Employment & Immigration)* (1989), 36 Admin. L.R. 235, 8 Imm. L.R. (2d) 48, 27 F.T.R. 74 (Fed. T.D.).

This is an application for an order by way of *certiorari* quashing the decision of the respondent refusing the applicant's request for permanent residence in Canada.

Applications for permanent residence under the self-employed provisions involve a two-stage assessment process. The first phase is a paper-screening process in which immigration officials evaluate documents submitted by the applicant and decide if the application process should be continued. If the applicant passes this phase, he is invited to an interview. One of the most significant factors in any assessment is the applicant's possibility of supporting himself in Canada. Points are therefore awarded for occupational demand in the paper-screening step and for experience in the final assessment. Where an applicant is not awarded any units of assessment for experience, an immigrant visa cannot be issued unless the visa officer believes there are good reasons why the number

of points do not reflect the chances of the applicant to become successfully established in Canada and those reasons have been approved by a senior immigration officer. A candidate for self-employment is also subject to the definition of a self-employed person and must be someone who intends and has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the artistic or cultural life of Canada. In addition, the visa officer will award 30 units of assessment to an applicant seeking to be self-employed if it is his opinion that the applicant will be able to become successfully established in his business in Canada.

The purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation.

The applicant is from the People's Republic of China and had been residing in the United States since 1986. In 1987, she applied for permanent residence and states that she was planning to pursue the profession of a self-employed music teacher. The applicant received training in China in both Oriental and Occidental music. She arrived in the United States on a student visa and was awarded a scholarship and completed a Master's degree in music. The applicant performed extensively in China and participated in one vocal competition in the United States.

The applicant was interviewed and, at the conclusion of the interview, the applicant learned that a decision could not be made until the officer consulted her colleagues and reviewed the requested documents. The applicant hand-delivered the requested documents on November 17, 1987. The applicant received a letter of refusal dated November 16, 1987.

The written refusal concentrated on the visa officer's opinion that the applicant's business would be unsuccessful and that the applicant would not make a significant contribution to the economy or cultural or artistic life of Canada. The visa officer's notes, taken during the interview, however, deal exclusively with the applicant's experience. The visa officer's notes indicate that the refusal was also based on a lack of self-employed experience in the applicant's intended occupation of self-employed music teacher. The Court noted that the applicant was an accomplished musician and had experience as a teacher and concluded that the visa officer had placed an undue emphasis on the applicant's lack of experience as a self-employed teacher and that the interpretation taken by the visa officer made it almost impossible for the applicant to succeed. This interpretation was found to be a fundamental breach of the duty of fairness.

Further, no questions were posed dealing with the possibilities of the applicant's contributions to cultural, economic or artistic life. The officer, at least partially, based her refusal on these criteria and yet did not, at the time of the interview, give any indication of a negative assessment on this basis nor provide the applicant with an opportunity to reply to those criteria.

Finally, the Court noted that the decision made by the officer predated the receipt of the requested documentary information. The decision of the visa officer was set aside and the respondent was directed to carry out an assessment of the applicant in accordance with the Immigration Act and Regulations in a manner consistent with the interpretation placed upon them in the Court's reasons.

*Son/Daughter*

*Canada (Min. of Employment & Immigration) v. Sidhu* (1993), 152 N.R. 225 (Fed. C.A.).

The respondent and his wife purported to adopt the daughter of the respondent's sister in India. An application for permanent residence was made to Canadian authorities on behalf of the child. In view of the fact that the sponsor had already two living daughters at the time of the adoption, the visa officer refused to issue the visa on the ground that the adoption was invalid by virtue of section 11 of the Hindu Adoptions and Maintenance Act, 1956 of India. The Appeal Division had declined to give effect to section 11(2) of the Indian statute because it was discriminatory and invalid as contrary to public order in Canada.

It is undoubtedly correct law to refuse a Canadian statute which would in effect discriminate on the basis of religion. The Appeal Division, however, has no jurisdiction under the Immigration Act to grant a foreign adoptive status which was not valid under foreign law on the grounds that the cause of the invalidity is contrary to Canadian public policy. Its jurisdiction is limited by the Immigration Act, which in turn is subject to the Constitution Act, 1867. Parliament has not purported to legislate independently on the subject matter of adoption for immigration purposes. On that very point it defers foreign legislation.

The visa officer and the Appeal Division essentially had to decide a question of fact. They had before them the relevant foreign legislation and the evidence which rebutted the presumption of validity of the deed of adoption possessed by the respondents. They had the power and duty to determine the status in India of the child, but only for purposes of landing in Canada. The appeal, however, was allowed on other grounds and referred back to the Appeal Division for re-hearing.

*Singh v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 37, 11 Imm. L.R. (2d) 1, 116 N.R. 176 (C.A.), leave to appeal to S.C.C. refused (1991), 13 Imm. L.R. (2d) 46 (note), 131 N.R. 319 (note) (sub nom. *Brar v. Min. of Employment & Immigration*) (S.C.C.).

For digest, see section 2.01, subheading *Subsection (1), Adopted, supra*.

*Sashi v. Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288.

For digest, see section 2.01, subheading *Subsection (1), Adopted, supra*.

*Tse v. Min. of Employment & Immigration* (1983), 45 N.R. 252 (Fed. C.A.).

The Court made reference to the law of Hong Kong which legitimized the status of a concubine lawfully taken before 7 October 1971; the 3 children whom the appellant wished to sponsor were thus designated issue of a marriage for purposes of the Act and regulations. The Court first determined the domicile of the appellant, because legitimacy must be determined in accordance with the law of that province. The law of Ontario at the time of the sponsorship application had eliminated the concept of illegitimacy and made every child legitimate as of the date of its birth.



### Transitional Provision

**2.01** For the purposes of paragraphs (a) and (c) of the definition “minimum investment” in subsection 2(1), the approval by the Minister of an eligible business or a fund includes any amendment thereof granted by the Minister, but in respect of any amendment for the purpose of extending the offering period, the approval only includes

- (a) in the case of an investment described in paragraph (a) of that definition, an amendment of the approval that extends the offering period to a date not later than December 31, 1992; and
- (b) in the case of an investment described in paragraph (c) of that definition, an amendment of the approval that extends the offering period to a date not later than January 31, 1996.

### Ministerial Exemptions

**2.1** The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person’s admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

**3.** [Revoked SOR/93-44.]

### Members of the Family Class

**4. (1)** Subject to subsections (2) and (3), the family class is hereby prescribed as a class of immigrants for the purposes of subsection 6(1) of the Act.

**(2)** The family class does not include a spouse or son or daughter referred to in

- (a) subparagraph 6(5)(a)(i) or (ii) in respect of whom a visa officer did not make a determination under paragraph 6(1)(a);
- (b) subparagraph 9(2)(a)(i) or (ii) in respect of whom a visa officer did not make a determination under paragraph 9(1)(a); or
- (c) subparagraph 10(4)(a)(i) or (ii) in respect of whom a visa officer did not make a determination under paragraph 10(1)(a) or (1.1)(b).

**(3)** The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.

### Subsection (3)

*Adebiyi v. Canada (Min. of Employment & Immigration)* (1994), 73 F.T.R. 230.

This was an application to review a decision determining that there were insufficient humanitarian and compassionate grounds to warrant processing the applicant's application for permanent residence from within Canada. The applicant, a national of Nigeria, claimed refugee status and then married a permanent resident of Canada. His claim to refugee status was denied. Both the applicant and his wife were questioned separately to determine if their marriage was *bona fide*.

The applicant had every reason to be aware that his credibility was suspect in light of the decision of the Refugee Division in his case and that the timing of his marriage might well be considered suspect. Neither of these issues were addressed in the written representations received in support of the humanitarian and compassionate application. The marriage interview process is conducted separately for the very purpose of avoiding collusion between the claimant and his witness as to the circumstance of the marriage. Procedural fairness does not require that the respondent disclose the discrepancies arising out of the separate interview of the applicant and his spouse, nor does it require the provision of an opportunity to respond to those discrepancies. The Court preferred the reasoning of Noel J. in *Grewal v. Canada (Min. of Employment & Immigration)* (1993), 62 F.T.R. 308 to the decision of Rothstein J. in *Ramoutar v. Canada (Min. of Employment & Immigration)*, [1993] 3 F.C. 370, 21 Imm. L.R. (2d) 203, 65 F.T.R. 32.

*Singh v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. T-2011-92, October 8, 1993.

Ramesh Singh arrived in Canada and claimed refugee status. The claim was refused. He subsequently married a permanent resident of Canada. The waiver of the visa requirement included in section 9(1) was refused because the marriage was viewed as one of convenience.

Procedural fairness does not require that an applicant be given an opportunity to respond to discrepancies arising from spousal interviews. The interview process is conducted separately for the very purpose of avoiding collusion between the claimant and his witnesses as to the circumstances of the alleged *bona fide* marriage and for the purpose of elucidating the truth.

The interview process, in this case, was not subject to criticism and the application for judicial review was refused.

*Ramoutar v. Canada (Min. of Employment & Immigration)*, 21 Imm. L.R. (2d) 203, 65 F.T.R. 32, [1993] 3 F.C. 370.

This application was for judicial review to quash a decision not to refer the applicant's case to the Governor-in-Council for an exemption, from the requirements of section 9(1) of the Immigration Act, on humanitarian and compassionate grounds.

The applicant had married a Canadian citizen. An Immigration officer, after reviewing the case, felt there was a reasonable doubt about the *bona fides* of the marriage and declined to refer the matter to the Governor-in-Council.

In assessing the *bona fides* of the applicant's marriage to a Canadian citizen on the basis of requiring proof of such *bona fides* beyond a reasonable doubt, the respondent erred in law. Proceedings under section 114(2) of the Immigration Act are civil in nature

and therefore the appropriate standard of proof is proof on a balance of probabilities — the standard applicable in civil proceedings.

*Canada (Min. of Employment & Immigration) v. Surinder Narwal* (1990), 10 Imm. L.R. (2d) 183, 26 R.F.L. (3d) 95 (Fed. C.A.).

The respondent landed in Canada in 1983 as a fiancée and was married. A year later, the respondent was divorced. The respondent then married her former husband's brother in England. During the period of her visit to England, a child, who was later born in Canada, was conceived. The husband returned to India after the marriage in England and filed an application for permanent residence which was sponsored by the respondent. During an interview, the applicant denied that his brother had in any way been related to the respondent. The respondent maintained regular correspondence with her new husband and visited him in India. The new husband's application for permanent residence was refused but the refusal was overturned by the Immigration Appeal Board. They decided that the validity of the marriage was governed by the law of India and that there was a custom permitting a woman to marry the brother of her former husband. The decision of the Board was based on humanitarian and compassionate grounds and the appeal was allowed on that basis. The Court observed that the Board erred in deciding that the substantial validity of the marriage was to be determined by the law of India, because there was on the facts a reasonable probability that the family would live in Canada with their Canadian born child.

The Court held that the respondent was validly married by the law of Canada and that the Board had jurisdiction to grant relief on humanitarian and compassionate grounds. The Minister's appeal was dismissed.

This case departs from the traditional view that the law governing capacity to marry is that of the domicile of both parties at the time of the marriage.

*Canada (Min. of Employment & Immigration) v. Taggar*, [1989] 3 F.C. 576, 8 Imm. L.R. (2d) 175, 60 D.L.R. (4th) 431, 99 N.R. 321 (Fed. C.A.).

The Minister appealed from a decision of the Immigration Appeal Board allowing an appeal by the respondent from the refusal of a visa officer to grant an immigrant visa to Ranjit Taggar, an Indian citizen whom the respondent had sponsored as her husband. The respondent had married Ranjit Taggar a few months after her previous marriage to his brother had ended in divorce. Under the Hindu Marriage Act, 1955, a marriage is null and void if one of the parties was "the wife of the brother . . . of the other" unless "the custom or usage governing each of them permits of a marriage between the two." As Ranjit Taggar had no evidence of such custom, the visa officer rejected his application for a visa. Ranjit Taggar submitted a new application and this time accompanied it with a copy of a judgment of an Indian Court in an action for a declaration that he had brought against the respondent. That judgment declared the respondent and Ranjit Taggar to be legally married. The visa officer refused to issue a visa taking the view that the judgment did not establish the validity of the marriage. Customs must be clearly proved to exist and the onus of establishing them rests upon those who rely on their existence. A custom that is not established is therefore deemed not to exist. The declaratory judgment produced by the respondent's husband was a judgment "in personam" which the respondent agrees bound only the two parties to the action. The existence of a custom was not an issue in that case. The judgment, therefore,



did not prove the custom, therefore, the marriage was invalid and, therefore, the Board had no jurisdiction to hear the appeal because the respondent was not married to the person whom she was seeking to sponsor and, therefore, Ranjit Taggar's application for permanent residence was not an application by a member of the family class.

*Kaur v. Canada (Min. of Employment & Immigration)* (1987), 5 Imm. L.R. (2d) 148 (Fed. T.D.).

The applicants were married to each other pursuant to an arranged marriage, as is the custom of their religion. The marriage took place in Canada and a request pursuant to section 115(2) was made to permit the application for permanent residence to proceed from within Canada. This request was denied by the respondent. The letter from the Department indicated that the marriage was entered into for "immigration purposes." This opinion was based on the fact that the information provided by the applicants, with respect to their marriage, was contradictory and inconsistent. This decision was set aside because the Department did not provide the applicants with any information about the inconsistencies, nor did it indicate whether the inconsistencies were the sole reason for its decision. Finally, there was no opportunity granted to the applicants to comment on these inconsistencies.

*Ahn v. Canada (Min. of Employment & Immigration)* (1987), 2 Imm. L.R. (2d) 23 (Imm. App. Bd.).

This was an appeal from the refusal of a sponsored application for landing. The appellant had emigrated from South Korea in 1975. He returned there in 1984 and married the applicant, whom the appellant had known, at least to some extent, before he emigrated. The marriage was arranged by the appellant's brother and solemnized in Korea. The sponsored application was refused because, in the opinion of the immigration officer, the sponsoree had entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class, and not with the intention of residing permanently with her spouse. Refusal was held to be invalid. Section 4(3) of the Regulation sets out a double test: if the sponsoree's or applicant's intention falls outside the terms of either test, he or she is a spouse for the purposes of the definition of the family class. The Board noted that the motive behind an intention and the intention itself are not the same thing. Further, it was observed that even if it could be said that the sponsoree's intention was primarily to obtain admission to Canada for her younger son, that was not the exclusionary intention set out in section 4(3) of the Regulation. Accordingly, the appeal was allowed.

*Horbas v. Min. of Employment & Immigration*, [1985] 2 F.C. 359 (Fed. T.D.).

This was an application to quash a decision rejecting Imelda Horbas as a spouse described in section 4(3) of the Regulation and for an order in the nature of *mandamus* requiring the respondents to process her application fairly and in accordance with the law. The application was dismissed. Section 4(3) was held to be not inconsistent with the Charter of Rights and Freedoms and in any event justified under section 1 of the Charter. Counsel for the respondents invoked section 1 and filed in support a study conducted by the Employment and Immigration Commission prior to the adoption of section 4(3) of the Regulation. An officer disqualifying a spouse under section 4(3) must apply a twofold test. First, a marriage must be entered into primarily for the purpose of gaining admission into Canada, and, second, there must be no intention on the part

of the prospective immigrant of residing permanently with the sponsoring spouse. Section 7 of the Charter was held not to enshrine a constitutional guarantee of the right of any Canadian to choose anyone in the world as a marital partner and bring such person to Canada to live with them. Section 4(3) of the Regulation did not violate section 15 of the Charter; it did not discriminate against persons whose cultures practised arranged marriages because in order to be disqualified under section 4(3) there must be no intention on the part of the prospective immigrant to permanently reside with the other spouse. On the question of whether the subsection was erroneously applied, it was noted that this issue could better be dealt with on an appeal to the Immigration Appeal Board, which was available to the Canadian sponsor, Joseph Horbas, because he was a Canadian citizen. On the application of section 2(d) of the Charter, the “freedom of association” clause, the Court seemed to say that the right to cohabit was not part of the constitutionally guaranteed freedom of association.

*Sahota v. Min. of Employment & Immigration* (1985), 21 Admin. L.R. 95 (Fed. T.D.).

Section 4(3) of the Immigration Regulation speaks from the day on which it was enacted, namely April 1, 1984. It does not apply to applications submitted prior to that date.

#### **5. [Revoked SOR/93-44.]**

**6. (1) Subject to subsections (1.1), (3.1), (3.2), (4), (5) and (6), where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if**

**(a) he and his dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations;**

**(b) the sponsor**

**(i) has given an undertaking,**

**(ii) is not in default in respect of any obligations assumed by him under any other undertaking given by him with respect to any member of the family class or assisted relative, and**

**(iii) will, in the opinion of an immigration officer, be able to fulfil the undertaking referred to in subparagraph (i);**

**(c) in the case of any of the following members of the family class who is a child or orphan, the child welfare authority of the province in which the child or orphan is to reside has stated in writing that it has no objection to the proposed arrangements for the reception and care of the child or orphan, namely,**

**(i) a child described in paragraph (b) of the definition “member of the family class” in subsection 2(1) who has been adopted outside Canada by the sponsor while the sponsor was residing in Canada,**

- (ii) an orphan described in paragraph (e) of the definition “member of the family class” in subsection 2(1), or
- (iii) a child described in paragraph (g) of the definition “member of the family class” in subsection 2(1);

(d) in the case of a fiancéé,

- (i) the sponsor and the fiancéé intend to reside together permanently after being married and have not become engaged primarily for the purpose of the fiancéé gaining admission to Canada as a member of the family class,
- (ii) there are no legal impediments to the proposed marriage of the sponsor and the fiancéé under the laws of the province in which they intend to reside, and
- (iii) the sponsor and the fiancéé have agreed to marry each other within ninety days after the admission of the fiancéé; or

(e) in the case of a person described in paragraph (b) of the definition “member of the family class” in subsection 2(1), or a dependant of a member of the family class, who has been adopted, the person or dependant was adopted before having attained 19 years of age and was not adopted for the purpose of gaining admission to Canada of the person or dependant, or gaining the admission to Canada of any of the person’s or dependant’s relatives.

(1.01) Paragraph (1)(e) is retroactive and applies in respect of all applications for landing made by members of the family class pending on April 15, 1994.

(1.1) Where a visa officer does not issue an immigrant visa as an accompanying dependant to a son or daughter of a member of the family class referred to in subsection (1), or of the spouse of that member of the family class, the visa officer shall not issue an immigrant visa as an accompanying dependant to a son or daughter of that son or daughter.

(2) For the purpose of forming an opinion as to whether a sponsor will be able to fulfil the undertaking referred to in subparagraph (1)(b)(i), an immigration officer shall take into account the factor set out in Schedule IV.

(3) An immigration officer is not required to form an opinion pursuant to subparagraph (1)(b)(iii) in respect of a person who

- (a) is the spouse of the sponsor and does not have any accompanying dependants who have issue;
- (b) is an accompanying dependant of the spouse of the sponsor and, at the time the sponsor gave the undertaking referred to in subparagraph (1)(b)(i), was

- (i) under 19 years of age, and



(ii) without issue; or

(c) is a person described in paragraph (b) of the definition “member of the family class” in subsection 2(1) and, at the time the sponsor gave the undertaking referred to in subparagraph (1)(b)(i), was

(i) under 19 years of age, and

(ii) without issue.

(3.1) An immigration officer is not required to consider subparagraph (1)(b)(ii) or to form an opinion pursuant to subparagraph (1)(b)(iii) in respect of a person who is a member of the family class and who intends to reside in the Province of Quebec.

(3.2) Subject to subsection (3.3), a visa officer shall not issue an immigrant visa to a member of the family class who intends to reside in the Province of Quebec unless the Minister of Cultural Communities and Immigration of that Province is of the opinion that the sponsor of the member of the family class will be able to fulfil the undertaking referred to in subparagraph (1)(b)(i).

(3.3) Subsection (3.2) does not apply to a person referred to in paragraph (3)(a), (b) or (c).

(4) [Revoked SOR/92-101.]

(5) For the purposes of subsection (1), a visa officer

(a) is not required to determine whether a dependant is a member of an inadmissible class if the dependant is

(i) the spouse of the applicant, where, on the basis of written evidence, an immigration officer is satisfied that the spouse is separated from and no longer cohabiting with the applicant or,

(ii) a son or daughter of the applicant, or of the spouse of that applicant, where an immigration officer is satisfied that custody or guardianship of the son or daughter has been legally vested in

(A) the spouse of the applicant, referred to in subparagraph (i), or

(B) a former spouse of the applicant, and

(b) shall not issue an immigrant visa to a dependant referred to in paragraph (a) as an accompanying dependant.

(6) A visa officer shall not issue an immigrant visa to a dependent son or dependent daughter referred to in paragraph (b) of the definition “member of the family class” in subsection 2(1) or a dependent son or dependent daughter of a member of the family class unless

(a) at the time the application for an immigrant visa is received by an immigration officer, the son or daughter meets the criteria respecting age,

and marital or student status set out in the definitions “dependent son” and “dependent daughter” in subsection 2(1); and

(b) at the time the visa is issued, the son or daughter meets the criteria respecting marital or student status set out in those definitions.

### *Subsection (1)*

#### *Paragraph (a)*

*Anthony v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T-84-9706, December 16, 1985.

The appellant, a citizen of Jamaica, was granted landing at Toronto International Airport on August 8, 1981 in order to marry her sponsor, Frank Anthony. The application for permanent residence, completed on January 27, 1981, was false in that the appellant listed only 2 of her 4 children and wrote, in her own handwriting, “I have no other children.” The appellant’s misrepresentations diverted the visa officer from carrying out his duties under the Act and Regulation, which required that he determine whether *all* the appellant’s dependants met the requirements of the Act and Regulation before he could issue an immigrant visa to her. The Board dismissed the appellant’s appeal, ruling that a deportation order, made under section 27(1)(e) of the Act, was valid.

*Grewal v. Min. of Employment & Immigration*, Imm. App. Bd., Vancouver, Doc. No. V82-6005, January 18, 1984.

This was a sponsorship appeal from the refusal to accept the application for permanent residence of the father of the sponsor and his accompanying dependant. It was possible to establish the relationship of the father, the mother and one brother of the sponsor. It was not possible to establish the relationship of another young man and woman who were alleged to be a brother and a sister of this sponsor. A majority was of the opinion that entry should be denied only to those not proven eligible and that the father, the mother and brother whose relationship to the sponsor was established should be permitted to come to Canada. The minority would have disallowed the application of all parties because other alleged dependants were inadmissible under the Regulation.

*Bala v. Min. of Employment & Immigration*, Imm. App. Bd., Toronto, Doc. No. T81-9204, January 11, 1983.

The sponsor appealed the refusal of the Minister to approve the application for permanent residence of his parents, his brother and his sister. The basis of the refusal was the lack of proper or satisfactory evidence with respect to the age of the brother and sister. The Board received and accepted the evidence of a professor of radiology at the Faculty of Medicine at the University of Toronto when he gave evidence of the age of these 2 children and accepted and concluded that they were under the age of 21 years at the time the application for permanent residence was filed. Accordingly, the sponsor’s appeal was allowed.

**Paragraph (b)**

*Johl v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 111 (Imm. App. Bd.).

This is an appeal from the refusal of the sponsored application for permanent residence. The appellant sponsored applications for his father, mother, sister and brother. The applicants were refused because the principle applicant was unable or unwilling to support himself, his wife and children without adequate settlement arrangements having been made by the sponsor. Whether a sponsor has an income at least equal to the low income cut-off per year for the number of his dependants, plus the number of his sponsorees, is but one factor that an immigration officer should consider in deciding whether the sponsor will be able to fulfill his undertaking. Other matters to be considered are the stability of the sponsor's employment and prospects for advancement; the willingness of the sponsor, his spouse and close relatives to do everything possible for the sponsorees; prospects of future employment of the sponsorees; the likelihood of the sponsorees establishing themselves quickly and easily; the ownership of a house and other assets; the sponsor's opportunity to get other work in case of lay-off; and, finally, whether the sponsor's skills are in a declining or expanding trade. The Board also stated that immigration officers are failing in their statutory duty if they do not give the sponsors or applicants, as the case may be, reasons for refusal couched in such a degree of particularity that they will know why there have been refusals and what cases must be met on appeal.

**Paragraph (d)**

*Kaur v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2490-84, May 8, 1985.

The applicant wanted to bring her fiancé to Canada so that they could be married. Apart from attempting to sponsor her fiancé, the applicant went to India and went through a form of marriage in that country with her fiancé. The initial application of the fiancé for permanent residence was turned down and one of the factors in the rejection was related to the opinion that the Indian marriage was invalid. The sponsor appealed to the Immigration Appeal Board, which observed that the marriage was to be presumed valid until ruled otherwise by a Court of competent jurisdiction. The respondent persisted in raising the question of validity of the Indian marriage and refusing to process the initial application for permanent residence. *Certiorari* was granted quashing this decision and the respondent was directed to process the application in accordance with the existing law and regulations, which the Court understood would result in the admission of the fiancé for a sufficient period for the marriage to take place. The validity of the Indian marriage was irrelevant to the determination of the application because the applicant was attempting to bring over a husband-to-be for the purpose of marriage in Canada.

*Gabriel v. Min. of Employment & Immigration* (1984), 60 N.R. 108 (Fed. C.A.).

The appellant was landed on condition that she marry within 90 days. This condition could not be obeyed as a result of circumstances beyond the appellant's control. Even though a condition is impossible to fulfill, so long as the person concerned knew of that condition and continued to remain in Canada in breach of that condition, such a



person has knowingly contravened a condition attached to the grant of landing. Even if the word “contravene” requires a positive act, the omission to do something which a person is required to do, is the commission of a positive act. It is an act of failure to do something required to be done and, accordingly, satisfies the definition of the term “contravenes”.

*Owens v. Min. of Manpower & Immigration*, Fed. C.A., Doc. No. A-615-83, March 27, 1984.

The sponsoree filed an application for permanent residence on February 22, 1981. At that time the sponsoree was not free to marry the sponsor because his divorce was not final. The sponsoree signed the application on May 19, 1981 at which time he swore before an official of the Government of Canada that the contents of his application were true. On this date the sponsoree was free to marry.

The application was refused. The respondent had taken the view that the relevant date was February 22, 1981, the date of the filing of the application. The Immigration Appeal Board agreed with the respondent; however, the Federal Court of Appeal allowed the appeal and set aside the Board's decision because it decided that the relevant date was May 19, 1981, the date the sponsoree swore to the truth of the facts contained in the application.

### ***Subsection (2)***

*Johl v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 111 (Imm. App. Bd.).

For digest, see section 6, subheading *Subsection (1), Paragraph (b), supra*.

**6.1 (1) Subject to subsection (3), for the purposes of subsection 6(2) of the Act, a sponsor may, in writing in a form fixed by the Minister, sponsor an application for landing made by a member of the family class.**

**(2) Where a sponsor sponsors an application for landing of a member of the family class described in paragraph (h) of the definition “member of the family class” in subsection 2(1) and that member is unable to meet the requirements of the Act and these Regulations or dies, the sponsor may sponsor the application for landing of another member of the family class described in that paragraph.**

**(3) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority may only sponsor an application for landing made by a member of the family class if an immigration officer is satisfied that the revocation of the adoption was not obtained for the purpose of sponsoring an application for landing made by that member.**

**Subsection (1)**

*Canada (Min. of Employment & Immigration) v. Porter*, Fed. C.A., Doc. No. A-353-87, April 14, 1988.

The visa officer's refusal of an application for permanent residence that, in fact, is based on an administrative delay of the Minister's own creation is invalid in law. The Government's duty is to facilitate family class applications, not to frustrate them.

*Sashi v. Canada (Min. of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 288 (Fed. T.D.).

The applicant sought to quash a decision of a visa officer in India refusing sponsorship applications for the applicant's mother and his adopted daughter. The visa officer refused to accept the sponsorship of the daughter because, as a result of his inquiries, he concluded that the provisions of the Hindu Adoptions and Maintenance Act had not been complied with. It was held that a visa officer has not only a right but a duty to ensure that all immigrants meet the requirements of the Act and Regulations. In this case, that included making certain that the sponsored child had been legally adopted within the meaning of section 2(1) of the Regulation. The officer's decision was not reached improperly or without justification. The officer did reach a conclusion that involved an interpretation of Hindu law, and he ought to have afforded the applicant some opportunity for counter-argument. However, the relief sought in this case, i.e. *certiorari* and *mandamus*, was discretionary, and in all the circumstances the motion was dismissed.

*Rattan v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 317 (Imm. App. Bd.).

This appeal was from the refusal of a sponsored application for landing of the appellant's spouse. The sponsor was a Canadian citizen, and the only child of the marriage was Canadian born. The spouse of the appellant (the father) had left Canada voluntarily after being advised he must make his sponsored application from outside Canada. The basis for the refusal was that the marriage was not permitted by the Hindu Marriage Act, 1955 because the appellant had been previously married to the sponsoree's uncle. The Board noted that while capacity to marry is presumed to be governed by the prenuptial domicile of the parties, an exception exists where it can be inferred that at the time of the marriage the parties intended to establish their home in a certain country (Canada) and did, in fact, establish it there within a reasonable time. In such a situation, the issue is whether the marriage is valid according to the laws of Canada, which it was. Accordingly, the refusal was found to be invalid and the appeal was allowed.

*Johl v. Canada (Min. of Employment & Immigration)* (1987), 1 Imm. L.R. (2d) 111 (Imm. App. Bd.).

This is an appeal from the refusal of the sponsored application for permanent residence. The appellant sponsored applications for his father, mother, sister and brother. The applicants were refused because the principle applicant was unable or unwilling to support himself, his wife and children without adequate settlement arrangements having been made by the sponsor. Whether a sponsor has an income at least equal to the low income cut-off per year for the number of his dependants, plus the number of his sponsorees, is but one factor that an immigration officer should consider in deciding

whether the sponsor will be able to fulfill his undertaking. Other matters to be considered are the stability of the sponsor's employment and prospects for advancement; the willingness of the sponsor, his spouse and close relatives to do everything possible for the sponsorees; prospects of future employment of the sponsorees; the likelihood of the sponsorees establishing themselves quickly and easily; the ownership of a house and other assets; the sponsor's opportunity to get other work in case of lay-off; and, finally, whether the sponsor's skills are in a declining or expanding trade. The Board also stated that immigration officers are failing in their statutory duty if they do not give the sponsors or applicants, as the case may be, reasons for refusal couched in such a degree of particularity that they will know why there have been refusals and what cases must be met on appeal.

*Information Commissioner v. Min. of Employment & Immigration*, [1986] 3 F.C. 63 (Fed. T.D.).

This was an application under the Access to Information Act, section 42(1)(a), for a review of the refusal by the Canada Employment and Immigration Commission to disclose the immigration file relating to the sponsorship by one, D.F., of his wife, P.F. The request was denied because the applicant sought personal information about another person. A complaint was lodged with the Information Commissioner, who recommended release of the information. The respondent Minister released five pages but refused to disclose a further 200 pages of documents. Pursuant to section 42(1)(a), that refusal was reviewed. The respondent was ordered to disclose the records in issue to the Information Commissioner. The purpose of the Access to Information Act was to codify the right to access to information held by the Government. It was not to codify the Government's right to refuse to release such information. Exemptions from the right to disclose are exceptional and must be confined to those exemptions specifically set out in the statute.

*Wong v. Canada (Min. of Employment & Immigration)* (1986), 64 N.R. 309 (Fed. C.A.).

Chong Wong delivered an undertaking respecting his father, mother and brother to come to Canada from the People's Republic of China on October 29, 1981. Prior to November 5, 1981, Chong delivered application forms for admission to Canada partially completed, as required by the guidelines for dealing with persons emigrating from the People's Republic of China. On December 27, 1981, Biu, the accompanying dependant of the father of Chong, turned 21.

The trial judge had held that the application had not been made prior to November 5, 1981 because the forms had not been completed by that time. This was overruled on the basis that the application was deemed to have been submitted when whatever it was that was done by the applicant had the effect of initiating the process leading to the issuance or refusal of the visa.

*Singla v. Canada (Min. of Employment & Immigration)* (1986), 1 F.T.R. 264 (Fed. T.D.).

The applicant applied to sponsor his mother and his 2 brothers. The respondent Minister denied the application because there was not sufficient evidence to prove that Mrs. Singla, the mother of the applicant, was also the mother of the 2 dependent sons.



New evidence was later found by the applicant. He did not wish to make a new application because his 2 brothers were over the age of 21 by this time. His hope was to have the original application opened to consider this new evidence (blood tests). The Court ruled that the respondent Minister had a duty to consider the new evidence and to reopen the original application. A new application was held not to suffice because the brothers would, at the time of that application, be over the age of 21. The Court noted that the applicant had pressed his case with all due diligence. Further, the new evidence (blood tests) was not known to the applicant at the time of the original application. Thus, an order of *certiorari* issued, quashing the refusal to consider further the original application for landing. *Mandamus* issued requiring the respondent to reconsider such application on the basis of the new information submitted by the applicant.

*Mundi v. Canada (Min. of Employment & Immigration)* (1985), 63 N.R. 310 (Fed. C.A.).

This appeal arose from the refusal of a visa officer to approve the application of the appellant's father, Ajmer Singh Mundi, for the landing of himself, his wife, his son, Balwinder, and 2 daughters. The application had been sponsored by the appellant, who was at all material times a Canadian citizen. Ajmer Singh Mundi forwarded a false school leaving certificate for the purpose of establishing the date of birth of Balwinder Singh and to prove that Balwinder was under 21 years of age at the time of the application. The failure to satisfy the visa officer, with respect to Balwinder's age by means of this false school leaving certificate, did not affect the admissibility of Ajmer Singh, his wife and daughters because the false certificate, respecting Balwinder's age, was not relevant to the admissibility of the other family members. Section 9(3) was not a basis for refusing Ajmer Singh and the other family members because the false certificate was relevant only to Balwinder's admissibility as a dependant and had no bearing on whether the admission of the applicant and the rest of the family was contrary to the Act or Regulations. Further, section 79(1) did not allow the visa officer to refuse the application of the entire family simply because Balwinder was not a dependant and, therefore, not entitled to a visa. The application could only be refused in total if Ajmer Singh, who made the application, did not meet the requirements of the Act or Regulations.

*Editor's Note:* This case may have a much broader import than family class applications.

*Vashi v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1459-85, October 15, 1985.

The applicant married her husband on May 2, 1983. She submitted an undertaking on June 9, 1983 at the Canada Immigration Centre in Toronto. The husband submitted an application to the Canadian High Commission in New Delhi on July 19, 1983. At the date of this proceeding, no decision had been taken with respect to the application for permanent residence. The Court ordered that, due to the unexplained delays in this case, a decision be taken by December 31, 1985, subject to the respondents being able to show a need for an extension at that time.

*Kaur v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-2490-84, May 8, 1985.

The applicant wanted to bring her fiancé to Canada so that they could be married. Apart from attempting to sponsor her fiancé, the applicant went to India and went through

a form of marriage in that country with her fiancé. The initial application of the fiancé for permanent residence was turned down and one of the factors in the rejection was related to the opinion that the Indian marriage was invalid. The sponsor appealed to the Immigration Appeal Board, which observed that the marriage was to be presumed valid until ruled otherwise by a Court of competent jurisdiction. The respondent persisted in raising the question of the validity of the Indian marriage and refusing to process the initial application for permanent residence. *Certiorari* was granted quashing this decision and the respondent was directed to process the application in accordance with the existing law and regulations, which the Court understood would result in the admission of the fiancé for a sufficient period for the marriage to take place. The validity of the Indian marriage was irrelevant to the determination of the application because the applicant was attempting to bring over a husband-to-be for the purpose of marriage in Canada.

*Re Toor and Min. of Employment & Immigration* (1983), 144 D.L.R. (3d) 554 (Fed. C.A.).

A Canadian citizen applied to sponsor his wife and three children for admission. A visa officer refused to allow the wife and children to proceed to Canada and the sponsor appealed. The Immigration Appeal Board dismissed this appeal, holding that the wife did not meet the requirements of the Act and regulations because she had no intention of taking up residence in Canada when she filed her application for permanent residence. The Federal Court of Appeal set aside this finding as not being supportable on the evidence. Because the sponsor's husband was a Canadian citizen, the wife's ineligibility had no bearing upon whether the children met the requirements of the Act or the Regulation.

*Reece v. Min. of Employment & Immigration*, [1982] 2 F.C. 743 (Fed. T.D.).

The petitioner applied for the issue of a writ of *mandamus*, ordering the Minister to render a decision on her pending application for permanent residence, and for a writ of prohibition, preventing the holding of an inquiry. The application for *mandamus* was dismissed because there was no requirement for consideration of an application not made from abroad. Accordingly, the application for prohibition also failed.

*O'Grady v. Whyte* (1982), 42 N.R. 608 (Fed. C.A.).

The respondent attempted to sponsor his putative daughter who was living in Jamaica. The daughter came to Canada and while in Canada a sponsorship application was turned over to immigration officials in Hamilton. The respondent was advised that the application could not be processed because the daughter did not fall within the definition of the term as it appears in the Immigration Regulation, section 2(1). *Mandamus* was issued to compel the immigration officials to dispose of the application. On appeal this order was set aside because no application for permanent residence on behalf of the daughter had been made in Jamaica, nor had an Order in Council been issued under section 115(2) of this Act exempting her from the requirement of section 9(1). The Court held that there was no duty upon an immigration official to make a decision on a sponsorship application because the underlying requirement of a landing application had not been met.

*Lawrence v. Min. of Employment & Immigration*, [1980] 1 F.C. 779 (Fed. T.D.).

Where the sponsoree had no immigrant visa but was present in Canada, the department was required to give the sponsor a decision on her application. Given that the sponsoree was obligated under a departure notice to leave Canada not later than April 1, 1980, the decision should be made prior to the date. The Court upheld the right of the department to refuse the application on the ground that the sponsoree did not meet the requirements of the Immigration Act or Regulation because he had not applied for a visa at a visa office outside Canada. The Court also referred to the anomalous result that occurs where the department refuses to make a decision on the sponsorship application, namely the Immigration Appeal Board lacks jurisdiction to entertain an appeal at that stage by the sponsor.

*Gill v. Min. of Employment & Immigration*, [1979] 2 F.C. 782 (Fed. C.A.).

A son is entitled to sponsor his natural father for admission to Canada.

*Min. of Manpower & Immigration v. Tsiafakis*, [1977] 2 F.C. 216 (Fed. C.A.).

Even though an immigration officer is satisfied that a sponsor cannot make an application on behalf of a prospective sponsored relative, he must supply the prescribed form to the sponsor and, should he fail to do so, *mandamus* will issue.

### Investors

**6.11 The investor class is hereby prescribed as a class of persons who may be granted landing on the basis of their business experience, accumulated net worth and intention to make investments in Canada that meet the standards set out in these Regulations.**

**6.12 (1) An investor, other than an investor in a province, shall**

**(a) where the investor intends to reside in a place in Canada other than the Province of Quebec,**

**(i) invest in an approved business or fund, and**

**(ii) satisfy the selection standards referred to in paragraph 8(1)(c) and subparagraph 9(1)(b)(iii); and**

**(b) where the investor intends to reside in the Province of Quebec, satisfy the selection standards referred to in subparagraph 9(1)(c)(i) and clause 9(1)(c)(ii)(A).**

**(2) An investor in a province shall**

**(a) where the investor intends to reside in a place in Canada other than the Province of Quebec, satisfy the selection standards referred to in paragraph 8(1)(c) and subparagraph 9(1)(b)(iv); and**

**(b) where the investor intends to reside in the Province of Quebec, satisfy the selection standards referred to in subparagraph 9(1)(c)(i) and clause 9(1)(c)(ii)(B).**



(3) Subject to subsections (5) and (6), the Minister is hereby authorized to approve eligible businesses and funds.

(4) A person who is applying for the approval of the Minister for an eligible business or a fund shall submit to the Minister

(a) an offering memorandum that is restricted to investors, provides full, true and plain disclosure of all material facts relating to the eligible business or fund and includes the information, statements and documents set out in Schedule X;

(b) evidence that each person who manages or controls, is a director of, or owns, directly or indirectly, more than 10 per cent in the aggregate of the voting securities of the eligible business or fund or, where applicable, of the fund manager has signed the offering memorandum as a person applying for the approval of the eligible business or fund;

(c) an escrow agreement that sets out the terms on which the minimum investment of an investor will be held by the escrow agent; and

(d) any other information that, in the opinion of the Minister, is necessary for the assessment of the documents described in paragraphs (a) to (c).

(5) The Minister may only approve an eligible business or a fund if the eligible business or fund fosters the development of a strong and viable economy and regional prosperity in Canada and

(a) the eligible business or fund has been approved by the province of investment as being of significant economic benefit to that province;

(b) the eligible business or fund is Canadian controlled;

(c) in respect of an eligible business,

(i) the maximum offering is not more than \$35,000,000,

(ii) the minimum offering is at least the amount required to complete the active business operations described in the offering memorandum, taking into consideration available financing, or 20 per cent of the maximum offering, whichever is the greater amount, and

(iii) the total cost of the project of which the active business operations are a part does not exceed \$35,000,000;

(d) in respect of a fund,

(i) the maximum offering is not more than

(A) in the case of a privately administered venture capital fund, where the fund manager has not managed a privately administered venture capital fund that was approved by the Minister before August 9, 1993 or that is an approved fund, \$10,000,000, and

(B) in any other case, \$35,000,000, and

(ii) the minimum offering is at least \$1,000,000 or 10 per cent of the maximum offering, whichever is the greater amount;

(e) each approved business or fund in respect of which the offering period has not expired, in which a person described in paragraph (b) of the definition “related person” in subsection 2(1) is involved and that is operating in the same province of investment has received minimum investments that in the aggregate equal at least one half of the maximum offering;

(f) each approved business or fund in which a related person described in paragraph (b) of the definition “related person” in subsection 2(1) is involved is complying with the terms and conditions governing its approval and is otherwise complying with these Regulations;

(g) the eligible business or fund has not engaged in any artificial transaction;

(h) no related person in the eligible business or fund

(i) has submitted any false or misleading information to the Minister in relation to an application for the approval of a business or fund that was granted by the Minister before August 9, 1993 or an application for the approval of an eligible business or fund made in accordance with subsection (4), or in a report required in relation to a business or fund that was approved by the Minister before August 9, 1993, or that is an approved business or fund, or

(ii) made any false or misleading representation about a business or fund that was approved by the Minister before August 9, 1993 or that is an approved business or fund, or falsely represented that a business or fund was approved by the Minister before August 9, 1993 or was an approved business or fund; and

(i) each related person in the eligible business or fund who is a related person in another business or fund that was approved by the Minister before August 9, 1993 or that is another approved business or fund must have complied with all the terms and conditions governing the approval of the other business or fund.

(6) The Minister may not approve a privately administered venture capital fund if the fund is managed or controlled by a Canadian financial institution or a corporation that is associated, within the meaning of section 256 of the *Income Tax Act*, with a Canadian financial institution.

(7) Subsections (3) to (6) are retroactive and apply in respect of any application for the approval of an eligible business or a fund pending on August 9, 1993.

6.13 (1) A person who is applying for an amendment to an approval of an approved business or fund shall submit to the Minister

- (a) a written request that sets out the reasons for the intended change or details of any new material fact referred to in paragraph 6.14(1)(l); and
- (b) evidence that the intended change to the offering memorandum has been approved by the province of investment.

(2) The Minister may amend an approval granted pursuant to subsection 6.12(3) where

- (a) the approved business or fund is complying with the terms and conditions of its approval and is otherwise complying with these Regulations;
- (b) the amendment to the approval will not cause the approved business or fund to be in contravention of the terms and conditions of its approval or these Regulations; and
- (c) subject to subsection (3), in the case of an amendment to the expiry date of an offering period, the approved business or fund has made significant marketing efforts and, at the time of the application for an amendment to the approval referred to in paragraph (1)(a), the offering period has not expired.

(3) The Minister may amend an approval granted pursuant to subsection 6.12(3), for the purpose of amending the expiry date of an offering period, not more than twice and only to extend the offering period by not more than six months each time.

6.14 (1) An approval granted pursuant to subsection 6.12(3) and an amendment to an approval granted pursuant to section 6.13 are subject to the following terms and conditions:

- (a) the approved business or fund must deliver a copy of its offering memorandum to an investor before the investor agrees to make the minimum investment;
- (b) in the case of an approval granted pursuant to subsection 6.12(3), the offering period must be for a period of not more than 18 months, beginning on the day on which the Minister approves the eligible business or fund;
- (c) subject to paragraphs (d) and (e), an investor must deposit the minimum investment with the escrow agent within the offering period, and the minimum investment must be held in escrow in Canada or, if the escrow agent is a Canadian financial institution, may be held in escrow in the investor's country of origin, until
  - (i) the minimum offering is met,
  - (ii) those investors whose minimum investments in the aggregate equal the minimum offering have been issued immigrant visas as investors or have all agreed, in writing, to the release from escrow of their minimum investments before they are issued immigrant visas as investors, and
  - (iii) the certificates that represent the securities sold to investors have been deposited with the escrow agent;



- (d) where the minimum offering is not met within the offering period,
  - (i) all of the minimum investment of each investor must, within 30 days after the end of the offering period and as directed by the investor, be returned to the investor or transferred to another approved business or fund, and
  - (ii) the escrow agent must notify the Minister, the applicable visa office and the province of investment, in writing, of the direction given by each investor;
- (e) where an investor's application for an immigrant visa as an investor is refused by a visa officer, all of the minimum investment of the investor must be returned to the investor within 90 days after the day on which the investor advises the approved business or fund or, where applicable, the fund manager, in writing, of the refusal to issue the immigrant visa;
- (f) the escrow agent must hold the certificates that represent the securities sold to an investor until the investor's minimum holding period expires;
- (g) no government incentive or other incentive may be used to reduce the net cost of the minimum investment of an investor;
- (h) an investor must maintain the minimum investment
  - (i) where an immigrant visa is issued to the investor before the day on which the minimum holding period begins, for the period beginning on the day on which the investor is issued an immigrant visa as an investor and ending on the day on which the minimum holding period expires, and
  - (ii) in any other case, for the minimum holding period;
- (i) the approved business or fund must at all times be Canadian controlled and foster the development of a strong and viable economy and regional prosperity in Canada;
- (j) in the case of an approved business, the approved business must, within six months after the minimum investment is released from escrow to the business, invest, and for the minimum holding period maintain, all of the minimum investment in its active business operations;
- (k) in the case of an approved fund, the approved fund must, within nine months after the minimum investment is released from escrow to the fund, invest, and for the minimum holding period maintain, at least 70 per cent of the minimum investment in the active business operations of two or more eligible businesses that are operated in the province of investment;
- (l) in the case of an approved fund that invests in an eligible business, the total cost of the project of which the active business operations of the eligible business are a part and in respect of which the approved fund invests must not exceed \$35,000,000;
- (m) no part of the minimum investments, in the aggregate, that are invested in an eligible business may be used to

- (i) invest in the development, renovation or purchase of residential property, unless such an investment is permitted under an agreement entered into pursuant to subsection 108(2) of the Act,
  - (ii) make an investment in respect of which the approved business or fund pledges residential property as security,
  - (iii) invest in the purchase of existing commercial real property for the purpose of deriving rental income or for benefiting from increases in property values, or
  - (iv) invest in the purchase of existing commercial real property for use in the business activities of the eligible business, unless not more than 50 per cent of the minimum investments are so invested and the remaining percentage of the minimum investments is used to develop or renovate that property;
- (n) the approved business or fund must not engage in artificial transactions;
- (o) the approved business or fund must submit periodic reports to the Minister in accordance with section 6.16;
- (p) the approved business or fund must send to each investor the financial statements described in paragraph 6.16(b);
- (q) the approved business or fund must submit to the Minister a copy of all material intended to solicit a minimum investment, before the material is circulated, including, in the case of material in any foreign language, an accurate French or English translation of the material;
- (r) the approved business or fund must submit to the Minister the name, address, telephone number and facsimile number of each sales agent and marketing agent prior to the initiation of any sales or marketing effort;
- (s) all material intended to solicit a minimum investment in the approved business or fund must
- (i) be consistent with the contents of the offering memorandum,
  - (ii) not include false or misleading statements,
  - (iii) present an accurate view of the investment, and
  - (iv) provide a disclaimer stating that the approval of the Minister of the eligible business or fund does not mean that any government or securities commission in Canada has passed on the merits, feasibility, financing, investment potential, commercial viability or risks associated with the offering;
- (t) where there is a new material fact or where the approved business or fund intends to make a change to the contents of its offering memorandum, other than any editorial, grammatical or spelling changes or changes in the names of lawyers or accountants or in addresses, the approved business or fund must
- (i) until there is a final disposition in respect of all investors, forthwith

inform the Minister and the investors of the intended change or new material fact,

(ii) during the offering period, apply for an amendment to the approval from the Minister, in accordance with section 6.13, and

(iii) during the offering period, discontinue the offering until the approved business or fund has been advised, in writing, of the Minister's decision respecting the amendment to the approval;

(u) where the approved business or fund is granted an amendment to its approval pursuant to section 6.13, the approved business or fund must amend its offering memorandum in accordance with the approval of the amendment and send a copy of the amended offering memorandum to the Minister and each investor;

(v) where the approved business or fund makes an editorial, grammatical or spelling change, or makes a change in the names of lawyers or accountants or in addresses, in its offering memorandum, the approved business or fund must, until there is a final disposition in respect of all investors, forthwith inform the Minister and the investors of the change;

(w) the approved business or fund must take all necessary steps to ensure that the Minister is able to conduct an examination of the approved business or fund in accordance with section 102.001 of the Act;

(x) the approved business or fund and every related person must act in accordance with the terms and conditions governing the approval of the eligible business or fund and all amendments to the approval;

(y) every related person must meet the requirements of paragraph 6.12(5)(h) and (i); and

(z) where the approved business or fund is to be sold, it may only be sold to a person who meets the requirements of paragraphs 6.12(5)(h) and (i).

(2) Subsection (1) is retroactive and applies in respect of any application for the approval of an eligible business or a fund pending on August 9, 1993.

6.15 (1) The Minister is hereby authorized to impose terms and conditions in relation to any approval of an eligible business or a fund, in addition to the terms and conditions set out in subsections 6.12(5) and (6) and referred to in section 6.14.

(2) Subsection (1) is retroactive and applies in respect of any application for the approval of an eligible business or a fund pending on August 9, 1993.

6.16 The Minister is hereby authorized to require any person who manages or controls an approved business or fund to submit, until there is a final disposition in respect of all investors, the following periodic reports respecting compliance with the terms and conditions set out in subsections 6.12(5) and (6) and referred to in sections 6.14 and 6.15:

(a) an approved business or fund quarterly report that includes the infor-



mation set out in Schedule XI, within 30 days after the end of each quarter; and

(b) annual audited financial statements respecting the approved business or fund, within 140 days after the end of each financial year.

**6.17 (1)** The Minister may suspend an approval granted pursuant to subsection 6.12(3) if

(a) the approved business or fund does not comply with any term or condition referred to in section 6.14 or 6.15;

(b) the Minister has reasonable grounds to believe that the person who applied for the approval of the eligible business or fund submitted any false or misleading information to the Minister in relation to the application for approval, or that the approved business or fund or any person who manages or controls the approved business or fund submitted to the Minister any false or misleading information in a periodic report submitted in accordance with section 6.16;

(c) the Minister has reasonable grounds to believe that the approved business or fund, a related person in the approved business or fund or a sales or marketing agent for the approved business or fund, made any false or misleading representation respecting the approved business or fund;

(d) the Minister has reasonable grounds to believe that the approved business or fund, or any person who operates, manages, promotes or audits the approved business or fund, failed to provide information and explanations required pursuant to paragraph 102.001(2)(b) of the Act, to the extent that the business or fund or the person was reasonably able to do so, in respect of the business or fund or of any entity in which the business or fund has an investment; or

(e) the province of investment suspends or revokes its approval of the eligible business or fund.

(2) Where the Minister suspends an approval pursuant to subsection (1), the Minister is hereby authorized to impose additional terms and conditions respecting the lifting of the suspension.

(3) Where an approved business or fund does not comply with the additional terms and conditions imposed pursuant to subsection (2), the approved business or fund shall

(a) on request by the Minister and as directed by each investor, transfer the minimum investment of each investor to other approved businesses or funds; and

(b) notify the Minister, the applicable visa office and the province of investment of the directions referred to in paragraph (a).

**6.18** The Minister may revoke an approval of an approved business or fund where

- (a) no investor has invested in the approved business or fund during the offering period; or
- (b) the approved business or fund has transferred all of the minimum investments in accordance with subsection 6.17(3).

**6.19** Where there is a final disposition in respect of all investors, an approval of a business or fund by the Minister is no longer valid.

### Convention Refugees Seeking Resettlement

**7. (1)** Subject to section 11.1, where a visa officer has determined that a person is a Convention refugee seeking resettlement, the visa officer, for the purpose of determining whether that Convention refugee and that Convention refugee's dependants will be able to become successfully established in Canada, shall take into consideration

- (a) each of the factors listed in column I of Schedule I;
- (b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that Convention refugee and his accompanying dependants; and
- (c) any other financial or other assistance available in Canada for such Convention refugees.

**(2)** A person who is,

- (a) in the case of an individual, a member of a group of not less than five individuals, each of the members of which is a Canadian citizen or permanent resident, has attained at least 19 years of age and resides in the expected community of settlement, or
- (b) in the case of a corporation, a corporation incorporated under the laws of Canada or any province thereof and having representatives in the expected community of settlement,

may seek to facilitate the admission or arrival in Canada of a Convention refugee seeking resettlement where

- (c) each member of the group or the corporation has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the Convention refugee and his accompanying dependants for a period of one year,
- (d) each member of the group or the corporation is not in default with respect to any other undertaking given with respect to any other Convention refugee or his dependants, and
- (e) the members of the group or the corporation, in the opinion of an immigration officer,

(i) will make or have made adequate arrangements in the community of

expected settlement for the reception of the Convention refugee and his accompanying dependants, and

(ii) have sufficient financial resources and expertise to fulfil the undertaking referred to in paragraph (c).

(3) Subject to subsections (4) and (5), where a Convention refugee seeking resettlement makes an application for an immigrant visa, a visa officer may issue an immigrant visa to him and his accompanying dependants if he and those accompanying dependants

(a) meet the requirements of the Act and these Regulations;

(b) where the refugee and the refugee's accompanying dependants intend to reside in a place in Canada other than the Province of Quebec, will, in the opinion of the visa officer, be able to become successfully established in Canada; and

(c) where the refugee and the refugee's accompanying dependants intend to reside in the Province of Quebec, will, in the opinion of the Minister of Cultural Communities and Immigration of that Province based on regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, be able to become successfully established in that Province.

(4) Where a visa officer does not issue an immigrant visa as an accompanying dependant to a son or daughter of a Convention refugee referred to in subsection (3), or of the spouse of that Convention refugee, the visa officer shall not issue an immigrant visa as an accompanying dependant to a son or daughter of that son or daughter.

(5) A visa officer shall not issue an immigrant visa to an accompanying dependant of a Convention refugee referred to in subsection (3) unless

(a) at the time the application for an immigrant visa is received by an immigration officer, the dependant meets the criteria respecting age, and marital or student status set out in the definitions "dependent son" and "dependent daughter" in subsection 2(1); and

(b) at the time the visa is issued, the dependant meets the criteria respecting marital or student status set out in those definitions.

### Selection Criteria

8. (1) Subject to section 11.1, for the purpose of determining whether an immigrant and the immigrant's dependants, other than a member of the family class, a Convention refugee seeking resettlement or an immigrant who intends to reside in the Province of Quebec, will be able to become successfully established in Canada, a visa officer shall assess that immigrant or, at the option of the immigrant, the spouse of that immigrant,



(a) in the case of an immigrant, other than an immigrant described in paragraph (b) or (c), on the basis of each of the factors listed in column I of Schedule I;

(b) in the case of an immigrant who intends to be a self-employed person in Canada, on the basis of each of the factors listed in column I of Schedule I, other than the factor set out in item 5 thereof;

(c) in the case of an entrepreneur, an investor or a provincial nominee, on the basis of each of the factors listed in column I of Schedule I, other than the factors set out in items 4 and 5 thereof;

(d) [Revoked SOR/85-1038.]

(e) [Revoked SOR/91-433.]

(2) A visa officer shall award to an immigrant who is assessed on the basis of factors listed in column I of Schedule I the appropriate number of units of assessment for each factor in accordance with the criteria set out in column II thereof opposite that factor, but he shall not award for any factor more units of assessment than the maximum number set out in column III thereof opposite that factor.

(3) [Revoked SOR/85-1038.]

(4) Where a visa officer assesses an immigrant who intends to be a self-employed person in Canada, he shall, in addition to any other units of assessment awarded to that immigrant, award 30 units of assessment to the immigrant if, in the opinion of the visa officer, the immigrant will be able to become successfully established in his occupation or business in Canada.

### *Subsection (1)*

*Western Opportunities Ltd. v. R.*, Fed. T.D., Doc. No. T-3131-92, September 16, 1993.

This was an application by the defendants to strike the plaintiff's statement of claim on the grounds that it did not disclose a reasonable cause of action. Two doctors residing in Hong Kong, who apparently qualified under the immigrant investor program and who had invested with the plaintiff company, were refused visas without even being granted an interview.

The reasons given for the refusal was that doctors would be unable to demonstrate that they controlled or directed a financially successful business or commercial undertaking. It was further alleged that the agents or servants of the Minister applied invalid or arbitrary tests inconsistent with the policy of the Immigration Department. The Court declined to strike out the statement of claim. It was not plain and obvious that this action as pleaded revealed no cause of action. Breach of statute does not automatically give rise to tort liability. The acts constituting breach of a statutory duty by the Minister may, however, constitute actionable negligence. The named defendants were, however, struck as party defendants so that the only defendant remaining was Her Majesty the Queen. Pursuant to section 17 of the Federal Court Act, the Court had no jurisdiction to entertain this claim against the named defendants.

*Nanji v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 60, 66 F.T.R. 158.

The applicant applied for permanent residence in Canada as an Assisted Relative. The applicant indicated that he wished to be considered as the principal applicant and he signed the Immigration Application. His wife accompanied him to the interview and Mrs. Nanji was asked some questions about her intended occupation as a secretary. The facts disclosed that Mr. Nanji was the only applicant and there was no implied application by the applicant's wife.

The word immigrant means a person who seeks landing. In this case the only person who sought landing was the applicant.

Pursuant to section 8 of the Regulations, the visa officer is required to assess the immigrant or, at the option of the immigrant, the spouse of that immigrant. It is the responsibility of the applicant to designate who will be assessed. A visa officer is not required to assess both the applicant and his spouse. Section 8 makes it mandatory for the visa officer to assess only one or the other.

This application to quash the visa officer's decision to refuse the application without assessing the applicant's wife and her intended occupation was dismissed.

*Yang v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 155, 17 Imm. L.R. (2d) 229 (T.D.).

The decision refusing the applicant's application for permanent residence was quashed. The applicant submitted an application for permanent residence in Hong Kong. The applicant was interviewed and refused on the basis that she failed to accumulate sufficient credits under the selection criteria. The applicant was awarded 9 units for education. This determination was based on the policy of the Ministry that units of assessment are awarded in the educational factor only for education received to the end of secondary school. The applicant's position was that she should have been awarded 12 units of assessment for education. In Taiwan, secondary school education is completed within a nine year period following which the student proceeds to college. Accordingly, the tenth, eleventh and twelfth year of schooling are completed at a college rather than a high school. The Ontario Ministry of Education had provided the applicant with a letter indicating that it considers the 5 year diploma from the National Tai Chung Institute of Commerce to have an educational attainment comparable to someone with an Ontario Secondary School Diploma. Further, in the affidavit of Ms. Yang she deposed that at the interview she was never asked any questions pertaining to her educational background.

The visa officer had a duty to consider the applicant's submission that she was entitled to the maximum number of units of assessment in the education category. The failure to do so left a doubt as to whether a proper assessment of the applicant had taken place. Accordingly, an order in the nature of certiorari was granted and a new assessment by a different visa officer was ordered.

*Yeung v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 191, 53 F.T.R. 205 (Fed. T.D.).

Mr. Yeung was a citizen of Hong Kong. He was employed as a production manager. He filed an application for permanent residence on December 12, 1989 together with the prescribed processing fee. The application form had a notation that the applicant's sister in Canada was willing to assist. At the time the application was received the

occupation factor for production managers was one point. On January 30, 1991 the occupation demand for this occupation was set at 0. Mr. Yeung's application was reviewed in February 1991 and refused because the occupational demand on that date was 0.

The assessment date or lock-in date for determining the number of points to be awarded is the date of the original application and payment of the processing fee. This is true whether the independent applicant has a relative willing to assist or not.

*Choi v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 265, [1992] 1 F.C. 763 (C.A.).

The appellant attended at the Canadian Commission in Hong Kong and enquired about how to apply for permanent residence. He was provided with a pre-application questionnaire ("PAQ") but was not told that he could make a formal application until the applicant completed a PAQ and filed it with the Commission on October 16, 1987. On October 28, 1987 the appellant received the PAQ back with information that he had received a positive assessment. The appellant completed the Application for Permanent Residence ("IMM8") and paid the required processing fee. The appellant did this on November 6, 1987.

At the time of the assessment of his PAQ the occupational demand for his skills was 10 units. Effective November 2, 1987 the demand was reduced to one unit. The appellant received 65 units including the one unit of assessment for occupational demand against a requirement of 70 units for issuance of a visa. Had the appellant received the 10 units of assessment that were in effect in October 1987 he would have obtained 74 units and qualified for Permanent Residence. An Application for an Immigrant Visa is made when it duly initiates the process leading to the issue or refusal of the visa and not only when that processing is committed to a particular official authorized to dispose of the application. Any other date, except the date of the application, would be purely arbitrary as a lock-in date for the occupational demand factor, depending solely on the vagaries of the administrative process. The application date is the only date within the control of the applicant and is consequently the only date that can be established without arbitrariness.

It was an irresistible conclusion from the evidence that departmental policy was to withhold from applicants the information that they could proceed either by way of a PAQ or directly and immediately by a formal application. If applicants knew enough to request an application form they were given one. If they did not they were dealt with cursorily by being given a PAQ, which had the effect of enormously reducing the administrative burden on the visa officers.

When the Canadian government, through its agents, undertakes to supply information to immigration applicants as to how to become immigrants it assumes a duty to provide this information accurately. This does not imply that Canadian authorities must provide a detailed exegesis of Canadian immigration law but it does mean that immigration authorities have an obligation to provide basic information and to make available the appropriate forms.

The exigencies of fairness therefore require that the time of the appellant's application be deemed to be the date on which he returned the completed PAQ to the Hong Kong office with the consequence that the units of assessment for occupational demand in his case should be deemed to be 10 units.

The appeal was allowed with costs, the decision of the visa officer set aside and



the matter returned to a visa officer for reconsideration on the basis that the occupational demand factor for the appellant should be deemed to be 10 units of assessment.

*Mohammad v. Canada (Min. of Employment & Immigration)* (1991), 48 F.T.R. 96, 14 Imm. L.R. (2d) 104.

This was an application for *certiorari* to quash the decision of a visa officer denying the applicant's request for permanent resident status and *mandamus* to compel the respondent to process the application in accordance with the Immigration Act and the Regulations. The applicant, a resident of Pakistan, submitted an application on November 28, 1988 requesting permanent resident status in Canada as an assisted relative. This application was forwarded by his Toronto solicitor to the Canadian High Commission in Islamabad, Pakistan. The applicant's occupation was identified as sales representative/food products. An applicant for permanent residence must obtain an aggregate of 70 units. One of the criteria to be considered is occupational demand. A list of occupational categories and their corresponding units of assessment is maintained by the Canada Employment and Immigration Commission. This list is periodically updated and the units of assessment are increased or decreased to reflect labour market demand. On November 28, 1988, there were 10 units of assessment available for occupational demand in the category in which the applicant had requested assessment, however, the application was stamped received by the Canadian High Commission on January 16, 1989 by which time the units of assessment for occupational demand had been decreased to 1. According to departmental policy, units of assessment lock in as of the date that the application is received by the appropriate visa officer. This provision of the policy guidelines did not offend the duty of fairness. When applications are submitted by mail or courier, if there is some lengthy delay for receipt by the proper office, the onus rests with the applicant to satisfy the Court that the unreasonable delay should not be attributed to him. This onus was not met in this case and the application was dismissed.

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another Immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an application with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his

affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Uy v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 201, 12 Imm. L.R. (2d) 172, 121 N.R. 248, 40 F.T.R. 80 (note) (C.A.).

This is an appeal from the Trial Division which refused *certiorari* quashing the refusal by a visa officer of the appellant's independent application. The appellant had been a qualified medical doctor in the Philippines and was a resident in pediatrics in the United States when he applied for admission to Canada as a medical technologist. The visa officer refused to assess him in respect of that occupation because he did not believe that the appellant would pursue the occupation in Canada. In doing so, the visa officer erred in law. There was no suggestion in this case that the visa officer had assessed the appellant for the occupation of medical technologist. The visa officer awarded him 70 or more units and then invoked section 11(3) of the Regulations by reason of his conclusion as to the appellant's intentions. Section 6 of the Act requires a visa officer to assess any immigrant who applies for landing in the manner prescribed by the Act and Regulations. Section 8(1) of the Regulations imposes in mandatory terms a duty to assess and nothing in either the Act or Regulations permits a visa officer to refuse to assess in respect of the occupation or alternative occupations which the immigrant states he or she intends to pursue in Canada. The general discretion given a visa officer by section 9(1) of the Regulations must be subordinated to the particular discretion given by section 11(3) where, notwithstanding the award of at least 70 units, the visa officer is of the opinion that those units do not reflect the chances of the particular immigrant becoming successfully established in Canada. The reasons for that opinion must be committed to writing and submitted to and approved by a senior Immigration officer. Accordingly, the appeal was allowed.

*D'Souza v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 268, 39 F.T.R. 1 (Fed. T.D.).

Ms. D'Souza applied for permanent residence as an independent immigrant. Her application was submitted under cover of a letter sent by her prospective employer and noted her occupation as executive secretary. The applicant was advised by letter that a barrier to acceptance of her application was the fact that there was only a limited demand in Canada for persons in her occupation. Accordingly, the applicant was advised to obtain a confirmation of her offer of employment by the local CEC. In the meantime, her application was refused.

There is no requirement arising by implication in the Act or Regulations that the visa officer must consult on his own initiative the National Employment Service. The applicant must demonstrate to the satisfaction of the visa officer who has been entrusted to decide that the criteria for admission have been met. So long as the procedures developed and followed by the Commission to fulfil its responsibilities in relation to immigration matters are not inconsistent with the requirements of the Act and Regulations, there can be no objection in law to them. The Minister must have discretion to develop administrative procedures to meet his or her statutory and regulatory responsibilities. The Court should intervene to limit that discretion only where it is clear that the procedures

are inconsistent with or otherwise beyond the authority of the Minister under the Act and Regulations.

The decision to withhold the grant of a visa until confirmation of employment had been communicated from the National Employment Service to the visa officer was not an improper delegation of authority. The Regulations, in particular item 5 of schedule 1, provide for the visa officer assessing an application for permanent residence in part by having referenced to arranged employment and to consider that criterion for admission based on information provided by the National Employment Service. If this determination of particular aspects of employment is considered to be delegation, then it is delegation made by the Regulations and it is authorized. It is not a delegation made by the visa officer.

The assessment criteria established by schedule 1 to the Regulations are not inconsistent with the Act and Regulations. The requirement that a local CEC office validate arranged employment falls clearly within section 114(1)(a) as a matter within "labour market conditions in Canada for the purpose of determining whether or not an immigrant will be able to become successfully established in Canada." In the detail of factors to be considered by the National Employment Service in considering matters within item 5 of schedule 1, the Service must be careful to consider only those matters which can be justified as being clearly within the factors set out in the schedule. Section 20(3) of the Regulations is much more precise than item 5 of schedule 1. While it may be a worthwhile objective of the Employment Service to insist upon the training of Canadians, such a requirement is not clearly within the factors to be considered in relation to item 5 of schedule 1. It is not appropriate to insist that the prospective employer of an applicant/immigrant first be expected to train persons already in Canada before authorization is given to arranged employment nor is it appropriate to insist in practice upon any standard minimum period for a prospective employer to seek unsuccessfully an employee through the CEC services. The employment officer must be prepared to look at whatever evidence this prospective employer may have of his efforts to hire Canadian citizens or permanent residents. The visa officer fulfilled his duties in this case and accordingly the applications for *certiorari* and *mandamus* were dismissed.

*Yu v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 176, 36 F.T.R. 296 (Fed. T.D.).

*Certiorari* was sought to quash a decision refusing the applicant's request for permanent residence status in Canada. The applicant applied pursuant to the independent provisions of the Immigration Regulations under section 8 and schedule 1 of those Regulations. In her application, she indicated that her intended occupation was as a librarian. In accordance with the Act, the applicant was required to establish that she met the selection criteria established by the Regulations for determining whether she would be able to become successfully established in Canada and that her admission to Canada would not be contrary to the Act or Regulations.

The visa officer, under section 8(1)(a) of the Regulations, was required to assess the applicant on the basis of each of the factors in schedule 1, three of which related to the applicant's intended occupation in Canada. Factor 2, specific vocational preparation, was assessed in relation to the amount of formal training specified in the CCDO. Factor 3, experience, was assessed by years in the intended occupation. Factor 4, occupational demand, was assessed in relation to occupational opportunities in Canada. If the applicant



is not deemed qualified for the occupation, then, regardless of the occupational demand, no units of assessment were to be awarded under factor 4 or under factor 3.

Schedule 1 required that the applicant's experience as a librarian could not be assessed favourably if she were unqualified by training for the occupation of librarian in Canada. There were no grounds for arguing unfairness merely because the visa officer did not stress all of the concerns he may have had at the interview arising directly from the Act and Regulations. The Act and Regulations pertinent to admission are available to the applicants whose task is to establish to the satisfaction of the visa officer that they meet the criteria set out and that their admission to Canada would not be contrary to the Act. This is to be distinguished from a situation where the decision refusing the application is made by reference to information other than the Regulations provided for in assessing the applicant. The CCDO relied upon in this case is specifically incorporated by reference in schedule 1, factor 2 and thus is part of the regulations. Where it is concluded that the applicant lacks the specific vocational preparation expected in Canada, years of experience in the occupation elsewhere cannot count towards the units required for assessment in meeting the criteria for admission. In this case the visa officer's decision was upheld and the motion to quash dismissed.

*Fong v. Canada (Min. of Employment & Immigration)*, 11 Imm. L.R. (2d) 205, 35 F.T.R. 305, [1990] 3 F.C. 705 (Fed. T.D.).

The application for permanent residence by the applicant began with an undertaking by his sister who was a Canadian citizen and living in Canada. A confirmation of offer of employment for the applicant was also obtained and forwarded to the visa officer. The applicant was interviewed but the visa officer had no notes of that interview and did not record in the computer the results of the interview. The basis of the refusal was that the applicant did not meet the job requirement by reason of his lack of experience, his lack of management in production line experience, his poor knowledge of English and limited education and funds. The applicant failed on points. The visa officer's decision was overturned. There was no cogent evidence that the visa officer went beyond the intended job description of production line manager and the CCDO definition thereof and directed a specific line of questioning about the applicant's actual work experience in the garment industry broken down into its constituent elements, for the purpose of making an appropriate assessment with respect to the applicant's adaptability or transferability to the intended occupation. Further, the visa officer committed a breach of the duty of fairness by his failure to afford the applicant an adequate opportunity to answer the specific case against him on the issue of related experience *vis-à-vis* the job offer of production line manager. The visa officer could have done this and should have done this once it became apparent that the application was likely to fail on that score. In this case the visa officer had simply asked the applicant if there was any other information relevant to the case that had not been covered, which the applicant might wish to add for the officer's consideration. This was held to be not sufficient. Finally, the Court noted that the visa officer owed a duty to the applicant to tell him by appropriate questions of his immediate impression regarding the deficiency of proof of intended and related employment and the likely consequences thereof in order to give the applicant some opportunity of disabusing the visa officer of that crucial impression. Accordingly, the visa officer's decision was set aside and the Respondent Minister was directed to

consider the application of the applicant according to the relevant provisions of the Immigration Act and Regulations.

*Li v. Canada (Min. of Employment & Immigration)* (1990), 9 Imm. L.R. (2d) 263 (Fed. T.D.).

The applicant requested permanent residence in Canada as an independent applicant pursuant to section 6(1) of the Immigration Act. Such applications involve a two-stage process during which it is the visa officer's duty to apply criteria set forth in the legislation and award points based on the ability of the applicant to become successfully established in Canada.

The first phase of the assessment is a paper-screening process in which immigration officials evaluate documents submitted by applicants and decide if the application process should be continued. If the applicant passes this phase, he is invited to an interview with a visa officer. During the interview, the officer assesses the employment experience of the applicant and awards points for other factors based on information presented at that time.

One of the most significant factors in any assessment is the applicant's possibility of employment in Canada. Points are awarded both for occupational demand in the screening step and for experience in the final assessment. This process requires reference to the Canadian Classification and Dictionary of Occupations (CCDO). Assessment of any one intended occupation begins with the matching of the applicant's work routine with the specific occupation from the CCDO.

There is a clear responsibility on the part of a visa officer to assess alternate occupations inherent in the applicant's work experience. Where his work experience suggests that the occupation may be appropriate, the visa officer must assess the applicant in the designated occupation regardless of which alternate occupations the officer has seen fit to consider.

The applicant's present occupation in the Philippines was that of a proprietor of two businesses. The applicant spends approximately 90 per cent of his time dealing with the wholesale distribution of office machines and considered that the best designation in the CCDO was that of "Commercial Traveller". Further, in a letter to the Canadian Consulate General, the applicant asserted that he had the necessary qualifications as a "Sales Representative, Office Machines", a subclassification of Commercial Traveller. The officer formed the impression that the applicant sold only hand calculators on a retail basis. The officer concluded that the applicant lacked product and plant experience and stated that he was "unable to assess your application in that category." The decision was set aside and the visa officer was required to evaluate the applicant's work experience in the category the applicant originally requested. The respondent Minister was directed to carry out the required assessment through a different visa officer.

*Canada (Min. of Employment & Immigration) v. Ho* (1989), 27 F.T.R. 241, 8 Imm. L.R. (2d) 38 (C.A.).

The visa officer initially awarded the respondent 8 points for experience and changed that to "nil" because the officer spoke to someone at CEIC. The discretion of a visa officer to grant an immigrant visa is to be exercised according to law, *i.e.* the Immigration Act and Regulations. A visa officer cannot properly take account of general directives not having the force of law nor instructions from head office particular to the case at

hand. Those improperly fetter him in the exercise of the discretion that Parliament, not the Canada Employment and Immigration Commission, has entrusted to him.

*Fung v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 236, 27 F.T.R. 182 (Fed. T.D.).

The applicant applied for permanent residence in Canada pursuant to the assisted relative provisions in the Immigration regulations. Such applications involve a two-stage assessment process during which it is the visa officer's duty to apply criteria set forth in the legislation and to award points based on the ability of the applicant to become successfully established in Canada.

The first phase of the assessment is a paper-screening process. If the applicant passes this phase, he or she is invited to an interview with a visa officer. Points are awarded both for occupational demand in the paper-screening step and for experience in the final assessment.

The applicant identified his employment as a tally clerk and a checker. His intended occupation in Canada was listed as a production clerk. After consultation with her superiors, the visa officer indicated to the applicant that he required more experience in order to qualify as a production clerk in Canada. The visa officer had a duty to make an assessment of the applicant's work experience sufficient to evaluate it with respect to that applicant's intended occupation. The finding that the applicant lacked experience as a production clerk indicated to the Court that the applicant's experience had been explored at the interview. This section 18 application, the Court observed, was not an appellate review. To succeed, the applicant was required to do more than persuade the Court that it might have reached a different conclusion than the visa officer. Accordingly, the application was dismissed.

*Ho v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 38, 27 F.T.R. 241 (Fed. T.D.).

Applications for permanent residence under the self-employed provisions involve a two-stage assessment process. The first phase of the assessment involves a paper-screening process in which immigration officials evaluate documents submitted by the applicant and decide if the application process should be continued. If the applicant passes this phase, he is interviewed by a visa officer. One of the most significant factors in any assessment is the applicant's possibility of supporting himself in Canada. Points are therefore awarded for both occupational demand in the paper-screening step and in the final assessment for experience in the occupation for which the candidate is qualified and prepared to follow in Canada. Where an applicant is not awarded any units of assessment for experience, an immigrant visa cannot be issued unless the visa officer believes that there are good reasons why the number of points do not reflect the chances of the applicant to become successfully established in Canada and those reasons have been approved by a senior officer. A candidate for self-employment must be someone who intends and who has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the cultural or the artistic life of Canada. In addition, the visa officer will award 30 points of assessment to an applicant seeking to be self-employed if, in the visa officer's opinion, the applicant will be able to become successfully established in his business in Canada.



The purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation. In this case, the visa officer interpreted the regulations in such a narrow fashion as to render meeting qualifications virtually impossible and, as a result, treated the applicant unfairly. The applicant was an accomplished musician who was able to teach and, on the question of whether the applicant could be self-employed as a teacher, his only apparent failure was in the lack of actual experience. Undue emphasis was placed on the lack of experience as a result of which there was a fundamental breach of the duty of fairness. Accordingly, the application was allowed and the visa officer's decision set aside.

*Li Yang v. Canada (Min. of Employment & Immigration)* (1989), 36 Admin. L.R. 235, 8 Imm. L.R. (2d) 48, 27 F.T.R. 74 (Fed. T.D.).

This is an application for an order by way of *certiorari* quashing the decision of the respondent refusing the applicant's request for permanent residence in Canada.

Applications for permanent residence under the self-employed provisions involve a two-stage assessment process. The first phase is a paper-screening process in which immigration officials evaluate documents submitted by the applicant and decide if the application process should be continued. If the applicant passes this phase, he is invited to an interview. One of the most significant factors in any assessment is the applicant's possibility of supporting himself in Canada. Points are therefore awarded for occupational demand in the paper-screening step and for experience in the final assessment. Where an applicant is not awarded any units of assessment for experience, an immigrant visa cannot be issued unless the visa officer believes there are good reasons why the number of points do not reflect the chances of the applicant to become successfully established in Canada and those reasons have been approved by a senior immigration officer. A candidate for self-employment is also subject to the definition of a self-employed person and must be someone who intends and has the ability to establish or purchase a business in Canada that will create an employment opportunity for himself and will make a significant contribution to the economy or the artistic or cultural life of Canada. In addition, the visa officer will award 30 units of assessment to an applicant seeking to be self-employed if it is his opinion that the applicant will be able to become successfully established in his business in Canada.

The purpose of the Immigration Act is to permit immigration, not prevent it, and it is the corresponding obligation of immigration officers to provide a thorough and fair assessment in compliance with the terms and spirit of the legislation.

The applicant is from the People's Republic of China and had been residing in the United States since 1986. In 1987, she applied for permanent residence and states that she was planning to pursue the profession of a self-employed music teacher. The applicant received training in China in both Oriental and Occidental music. She arrived in the United States on a student visa and was awarded a scholarship and completed a Master's degree in music. The applicant performed extensively in China and participated in one vocal competition in the United States.

The applicant was interviewed and, at the conclusion of the interview, the applicant learned that a decision could not be made until the officer consulted her colleagues and reviewed the requested documents. The applicant hand-delivered the requested docu-

ments on November 17, 1987. The applicant received a letter of refusal dated November 16, 1987.

The written refusal concentrated on the visa officer's opinion that the applicant's business would be unsuccessful and that the applicant would not make a significant contribution to the economy or cultural or artistic life of Canada. The visa officer's notes, taken during the interview, however, deal exclusively with the applicant's experience. The visa officer's notes indicate that the refusal was also based on a lack of self-employed experience in the applicant's intended occupation of self-employed music teacher. The Court noted that the applicant was an accomplished musician and had experience as a teacher and concluded that the visa officer had placed an undue emphasis on the applicant's lack of experience as a self-employed teacher and that the interpretation taken by the visa officer made it almost impossible for the applicant to succeed. This interpretation was found to be a fundamental breach of the duty of fairness.

Further, no questions were posed dealing with the possibilities of the applicant's contributions to cultural, economic or artistic life. The officer, at least partially, based her refusal on these criteria and yet did not, at the time of the interview, give any indication of a negative assessment on this basis nor provide the applicant with an opportunity to reply to those criteria.

Finally, the Court noted that the decision made by the officer pre-dated the receipt of the requested documentary information. The decision of the visa officer was set aside and the respondent was directed to carry out an assessment of the applicant in accordance with the Immigration Act and Regulations in a manner consistent with the interpretation placed upon them in the Court's reasons.

*Hajariwala v. Canada (Min. of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 222, 34 Admin. L.R. 206, 23 F.T.R. 241, [1989] 2 F.C. 79 (Fed. T.D.).

The Court observed that those seeking landing in Canada must satisfy an immigration officer that they meet the selection standards set out in the regulations. It is the responsibility of the applicant to produce all relevant information which may assist in his application. The extent to which immigration officers may wish to offer assistance, counselling or advice may be a matter of individual preference or even a matter of departmental policy from time to time but it is not an obligation that is imposed upon the officers by the Act or the regulations.

Section 18 reviews are not appellate reviews. To succeed, the applicant must do more than establish the possibility that the Court would have reached a different conclusion than the visa officer in the assessment. There must be either an error of law apparent on the face of the record or a breach of the duty of fairness appropriate to this essentially administrative assessment. The regulations permit the applicant to be assessed in "an occupation". The factors listed in column 1 of schedule 1 require that the experience of the applicant be assessed with regard to his intended occupation. There is no reason why the actual experience and time spent in each of the various responsibilities in an occupation cannot be broken down to award units of assessment for experience in intended occupations. As a matter of fairness, the record should show that the applicant was given the opportunity to provide information in support of his current experience in each included occupation. The record must clearly indicate reasons which support the visa officer's assignment of a specific experience rating to the intended occupations or reasons which support the refusal to do so. In this case, the officer did not believe

that the various responsibilities which the applicant carried out in his business in India should be broken down into separate components for the purposes of awarding units of assessment for experience in his alternative intended occupation of material purchasing or garment sales representative. Accordingly, the officer refused to issue a visa and in so doing erred in law. The officer's decision was set aside.

*Muliadi v. Min of Employment & Immigration* (1986), 18 Admin. L.R. 243 (Fed. C.A.).

The appellant was a resident of Indonesia. He applied to come to Canada on the basis that he fell within the entrepreneurial category as an immigrant. His application was refused and that refusal was upheld by the Trial Division. The Court of Appeal overruled the Trial Division because the officer responsible for the disposing of the application failed to inform the appellant of the negative assessment of the appellant's business by the Province of Ontario, and to give the appellant a fair opportunity of correcting or contradicting that assessment before making the decision required by the statute. Further, the wording of the refusal and the conduct of the officer at the interview of the appellant suggested that the decision to refuse the appellant's application was, in fact, being made by the Government of Ontario official, with whom the visa officer consulted about the viability of the proposal, rather than by the visa officer himself. The uncontradicted evidence indicated that the visa officer had stated that he was sympathetic to the appellant's application but had to deny the application because the Ontario Government had refused it. Finally, the appeal was allowed because the visa officer, in his letter, indicated that he had paid particular attention to whether employment opportunities for "a significant number of Canadians would be created." The language of the definition of an entrepreneur did not impose such a requirement; therefore, the visa officer exceeded his jurisdiction and, for that reason as well, his decision could not stand.

*Editor's Note:* Some of the relevant regulations have been amended since this case arose. The Court's analysis of the propriety of the visa officer's decision may be more important than the result of the application.

#### ***Subsection (4)***

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing



the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the perspective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.

*Editor's Note:* See, however, section 11.1 of the Immigration Regulations.

*Ho v. Canada (Min. of Employment & Immigration)* (1989), 8 Imm. L.R. (2d) 38, 27 F.T.R. 241 (Fed. T.D.).

For digest, see section 8, subheading *Subsection (1)*, *supra*.

*Li Yang v. Canada (Min. of Employment & Immigration)* (1989), 36 Admin. L.R. 235, 8 Imm. L.R. (2d) 48, 27 F.T.R. 74 (Fed. T.D.).

For digest, see section 8, subheading *Subsection 1*, *supra*.

**9. (1) Subject to subsection (1.01) and section 11, where an immigrant other than a member of the family class, an assisted relative or a Convention refugee seeking resettlement makes an application for a visa, a visa officer may issue an immigrant visa to him and his accompanying dependants if**

(a) he and his dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations;

(b) where the immigrant and the immigrant's accompanying dependants intend to reside in a place in Canada other than the Province of Quebec, on the basis of the assessment of the immigrant or the spouse of that immigrant in accordance with section 8, and

- (i) in the case of an immigrant other than an entrepreneur, an investor or a provincial nominee, he is awarded at least 70 units of assessment,
- (ii) in the case of an entrepreneur or a provincial nominee, he is awarded at least 25 units of assessment,
- (iii) in the case of an investor other than an investor in a province, the investor is awarded at least 25 units of assessment and, since applying for an immigrant visa as an investor, has made a minimum investment

described in paragraph (a), (c) or (d) of the definition "minimum investment" in subsection 2(1), and

(iv) subject to subsection (1.02), in the case of an investor in a province, the investor is awarded at least 25 units of assessment and, since applying for an immigrant visa as an investor, has made a minimum investment described in paragraph (b) or (e) of the definition "minimum investment" in subsection 2(1); and

(c) where the immigrant and the immigrant's accompanying dependants intend to reside in the Province of Quebec,

(i) the Minister of Cultural Communities and Immigration of that Province is of the opinion, based on regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, that the immigrant and the immigrant's accompanying dependants will be able to become successfully established in that Province, and

(ii) in the case of an investor, since applying for an immigrant visa as an investor,

(A), where the investor is an investor other than an investor in a province, the investor has made a minimum investment described in paragraph (a), (c) or (d) of the definition "minimum investment" in subsection 2(1), and

(B) where the investor is an investor in a province, the investor has made a minimum investment described in paragraph (b) or (e) of the definition "minimum investment" in subsection 2(1).

(1.01) Where a visa officer does not issue an immigrant visa as an accompanying dependant to a son or daughter of an immigrant referred to in subsection (1), or of the spouse of that immigrant, the visa officer shall not issue an immigrant visa as an accompanying dependant to a son or daughter of that son or daughter.

(1.02) A visa officer shall not issue an immigrant visa to an investor in a province or to that investor's accompanying dependants if the visa officer is informed that the Minister has engaged in consultations with the province in respect of the interpretation or implementation of the agreement entered into between the province and the Minister in respect of the selection of immigrant investors and the consultations have not been successfully completed.

(2) For the purposes of subsection (1), a visa officer

(a) is not required to determine whether a dependant is a member of an inadmissible class if the dependant is

(i) the spouse of the applicant, where, on the basis of written evidence,

**an immigration officer is satisfied that the spouse is separated from and no longer cohabiting with the applicant, or**

**(ii) a son or daughter of the applicant, or of the spouse of that applicant, where an immigration officer is satisfied that custody or guardianship of the son or daughter has been legally vested in**

**(A) the spouse of the applicant, referred to in subparagraph (i), or**

**(B) a former spouse of the applicant, and**

**(b) shall not issue an immigrant visa to a dependant referred to in paragraph (a) as an accompanying dependant.**

**(3) [Revoked SOR/89-585.]**

### ***Subsection (1)***

*Yang v. Canada (Min. of Employment & Immigration)* (1992), 56 F.T.R. 155, 17 Imm. L.R. (2d) 229 (T.D.).

The decision refusing the applicant's application for permanent residence was quashed. The applicant submitted an application for permanent residence in Hong Kong. The applicant was interviewed and refused on the basis that she had failed to accumulate sufficient credits under the selection criteria. The applicant was awarded 9 units for education. This determination was based on the policy of the Ministry that units of assessment are awarded in the educational factor only for education received to the end of secondary school. The applicant's position was that she should have been awarded 12 units of assessment for education. In Taiwan, secondary school education is completed within a nine year period following which the student proceeds to college. Accordingly, the tenth, eleventh and twelfth year of schooling are completed at a college rather than a high school. The Ontario Ministry of Education had provided the applicant with a letter indicating that it considers the 5 year diploma from the National Tai Chung Institute of Commerce to have an educational attainment comparable to someone with an Ontario Secondary School Diploma. Further, in the affidavit of Ms. Yang she deposed that at the interview she was never asked any questions pertaining to her educational background.

The visa officer had a duty to consider the applicant's submission that she was entitled to the maximum number of units of assessment in the education category. The failure to do so left a doubt as to whether a proper assessment of the applicant had taken place. Accordingly, an order in the nature of certiorari was granted and a new assessment by a different visa officer was ordered.

*Editor's Note:* The regulations concerning education assessment have changed, but the principles outlined in this case may still be important.

*Choi v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 265, [1992] 1 F.C. 763 (C.A.).

The appellant attended at the Canadian Commission in Hong Kong and enquired about how to apply for permanent residence. He was provided with a pre-application questionnaire ("PAQ") but was not told that he could make a formal application until the applicant completed a PAQ and filed it with the Commission on October 16, 1987.



On October 28, 1987 the appellant received the PAQ back with information that he had received a positive assessment. The appellant completed the Application for Permanent Residence ("IMM8") and paid the required processing fee. The appellant did this on November 6, 1987.

At the time of the assessment of his PAQ the occupational demand for his skills was 10 units. Effective November 2, 1987 the demand was reduced to one unit. The appellant received 65 units including the one unit of assessment for occupational demand against a requirement of 70 units for issuance of a visa. Had the appellant received the 10 units of assessment that were in effect in October 1987 he would have obtained 74 units and qualified for Permanent Residence. An Application for an Immigrant Visa is made when it duly initiates the process leading to the issue or refusal of the visa and not only when that processing is committed to a particular official authorized to dispose of the application. Any other date, except the date of the application, would be purely arbitrary as a lock-in date for the occupational demand factor, depending solely on the vagaries of the administrative process. The application date is the only date within the control of the applicant and is consequently the only date that can be established without arbitrariness.

It was an irresistible conclusion from the evidence that departmental policy was to withhold from applicants the information that they could proceed either by way of a PAQ or directly and immediately by a formal application. If applicants knew enough to request an application form they were given one. If they did not they were dealt with cursorily by being given a PAQ, which had the effect of enormously reducing the administrative burden on the visa officers.

When the Canadian government, through its agents, undertakes to supply information to immigration applicants as to how to become immigrants it assumes a duty to provide this information accurately. This does not imply that Canadian authorities must provide a detailed exegesis of Canadian immigration law but it does mean that immigration authorities have an obligation to provide basic information and to make available the appropriate forms.

The exigencies of fairness therefore require that the time of the appellant's application be deemed to be the date on which he returned the completed PAQ to the Hong Kong office with the consequence that the units of assessment for occupational demand in his case should be deemed to be 10 units.

The appeal was allowed with costs, the decision of the visa officer set aside and the matter returned to a visa officer for reconsideration on the basis that the occupational demand factor for the appellant should be deemed to be 10 units of assessment.

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the perspective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.

*Editor's Note:* See, however, section 11.1 of the Immigration Regulations.

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another Immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an applicant with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Fong v. Canada (Min. of Employment & Immigration)*, 11 Imm. L.R. (2d) 205, 35 F.T.R. 305, [1990] 3 F.C. 705 (Fed. T.D.).

The application for permanent residence by the applicant began with an undertaking by his sister who was a Canadian citizen and living in Canada. A confirmation of offer of employment for the applicant was also obtained and forwarded to the visa officer. The applicant was interviewed but the visa officer had no notes of that interview and did not record in the computer the results of the interview. The basis of the refusal was that the applicant did not meet the job requirement by reason of his lack of experience, his lack of management in production line experience, his poor knowledge of English and limited education and funds. The applicant failed on points. The visa officer's decision was overturned. There was no cogent evidence that the visa officer went beyond the intended job description of production line manager and the CCDO definition thereof and directed a specific line of questioning about the applicant's actual work experience in the garment industry broken down into its constituent elements, for the purpose of making an appropriate assessment with respect to the applicant's adaptability or transferability to the intended occupation. Further, the visa officer committed a breach of the duty of fairness by his failure to afford the applicant an adequate opportunity to answer the specific case against him on the issue of related experience *vis-à-vis* the job offer of production line manager. The visa officer could have done this and should have done this once it became apparent that the application was likely to fail on that score. In this case the visa officer had simply asked the applicant if there was any other information relevant to the case that had not been covered, which the applicant might wish to add for the officer's consideration. This was held to be not sufficient. Finally, the Court noted that the visa officer owed a duty to the applicant to tell him by appropriate questions of his immediate impression regarding the deficiency of proof of intended and related employment and the likely consequences thereof in order to give the applicant some opportunity of disabusing the visa officer of that crucial impression. Accordingly, the visa officer's decision was set aside and the Respondent Minister was directed to consider the application of the applicant according to the relevant provisions of the Immigration Act and Regulations.

*Muliadi v. Min. of Employment & Immigration* (1986), 18 Admin. L.R. 243 (Fed. C.A.).

The appellant was a resident of Indonesia. He applied to come to Canada on the basis that he fell within the entrepreneurial category as an immigrant. His application was refused and the refusal was upheld by the Trial Division. The Court of Appeal overruled the Trial Division because the officer responsible for the disposing of the application failed to inform the appellant of the negative assessment of the appellant's business by the Province of Ontario, and to give the appellant a fair opportunity of correcting or contradicting that assessment before making the decision required by the statute. Further, the wording of the refusal and the conduct of the officer at the interview of the appellant suggested that the decision to refuse the appellant's application was, in fact, being made by the Government of Ontario official with whom the visa officer consulted about the viability of the proposal, rather than by the visa officer himself. The uncontradicted evidence indicated that the visa officer had stated that he was sympathetic to the appellant's application but had to deny the application because the Ontario Government had refused it. Finally, the appeal was allowed because the visa officer,



in his letter, indicated that he had paid particular attention to whether employment opportunities for "a significant number of Canadians would be created." The language of the definition of an entrepreneur did not impose such a requirement; therefore, the visa officer exceeded his jurisdiction and, for that reason as well, his decision could not stand.

*Editor's Note:* Some of the relevant regulations have been amended since this case arose. The Court's analysis of the propriety of the visa officer's decision may be more important than the result of the application.

**10. (1) Subject to subsections (1.1) and (1.2) and section 11, where an assisted relative makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the assisted relative and accompanying dependants of the assisted relative if**

- (a) he and his dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations;
- (b) in the case of an assisted relative who intends to reside in a place other than the Province of Quebec, on the basis of an assessment made in accordance with section 8, the assisted relative is awarded at least 65 units of assessment; and
- (c) in the case of an assisted relative who intends to reside in the Province of Quebec, the Minister of Cultural Communities and Immigration of that Province is of the opinion based on these Regulations or regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, that the assisted relative will be able to become successfully established in that Province.

**(1.1) Subject to subsection (1.2) and section 11, a visa officer may issue an immigrant visa to an assisted relative and accompanying dependants of the assisted relative if**

**(a) the assisted relative**

- (i) signified to a visa officer at the time an application for an immigrant visa was made that an undertaking would be submitted on the assisted relative's behalf, where the assisted relative has made the application for an immigrant visa before February 1, 1993,
- (ii) was notified in writing by a visa officer after an application for an immigrant visa was made before February 1, 1993 that the application would be assessed or re-assessed on receipt of an undertaking submitted on the assisted relative's behalf, where the assisted relative has made the application for an immigrant visa before February 1, 1993, or
- (iii) is a person on whose behalf an undertaking has been submitted before

February 1, 1993, and submits an application for an immigrant visa before February 1, 1994;

(b) the assisted relative and the assisted relative's dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations;

(c) a Canadian citizen or permanent resident who is at least 19 years of age and who resides in Canada has submitted an undertaking on the assisted relative's behalf

(i) in the case of an assisted relative referred to in subparagraph (a)(i) or (ii), before January 31, 1994, or before February 1, 1993;

(ii) in the case of an assisted relative referred to in subparagraph (a)(iii), before February 1, 1993;

(d) in the case of an assisted relative who intends to reside in a place in Canada other than the Province of Quebec,

(i) on the basis of an assessment in accordance with section 8, the assisted relative is awarded

(A) where the assisted relative is a brother, sister, son or daughter of the person who has given the undertaking referred to in paragraph (c), at least 55 units of assessment, and

(B) in any other case, at least 60 units of assessment, and

(ii) the person who has given the undertaking referred to in paragraph (c)

(A) is not in default in respect of any obligations assumed by the person under any other undertaking given by the person with respect to any member of the family class or an assisted relative, and

(B) will, in the opinion of an immigration officer, be able to fulfil the undertaking; and

(e) in the case of an assisted relative who intends to reside in the Province of Quebec,

(i) the Minister of Cultural Communities and Immigration of that Province is of the opinion based on these Regulations or regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, that the assisted relative will be able to become successfully established in that Province, and

(ii) the person who has given an undertaking referred to in paragraph (c) will, in the opinion of the Minister of Cultural Communities and Immigration of that Province, be able to fulfil that undertaking.

(1.2) Where a visa officer does not issue an immigrant visa to a son or

daughter, as an accompanying dependant, of an assisted relative referred to in subsection (1) or (1.1), or of the spouse of that assisted relative, the visa officer shall not issue an immigrant visa to a son or daughter of that son or daughter as an accompanying dependant.

(2) [Revoked SOR/93-44.]

(3) [Revoked SOR/91-157.]

(4) For the purposes of subsection (1), a visa officer

(a) is not required to determine whether a dependant is a member of an inadmissible class if the dependant is

(i) the spouse of the applicant, where, on the basis of written evidence, an immigration officer is satisfied that the spouse is separated from and no longer cohabiting with the applicant, or

(ii) a son or daughter of the applicant, or of the spouse of that applicant, where the immigration officer is satisfied that custody or guardianship of the son or daughter has been legally vested in

(A) the spouse of the applicant, referred to in subparagraph (i), or

(B) a former spouse of the applicant, and

(b) shall not issue an immigrant visa to a dependant referred to in paragraph (a) as an accompanying dependant.

11. (1) Subject to subsections (3) and (5), a visa officer shall not issue an immigrant visa pursuant to subsection 9(1) or 10(1) or (1.1) to an immigrant who is assessed on the basis of factors listed in column I of Schedule I and is not awarded any units of assessment for the factor set out in item 3 thereof unless the immigrant

(a) has arranged employment in Canada and has a written statement from the proposed employer verifying that he is willing to employ an inexperienced person in the position in which the person is to be employed, and the visa officer is satisfied that the person can perform the work required without experience; or

(b) is qualified for and is prepared to engage in employment in a designated occupation.

(2) Subject to subsections (3) and (4), a visa officer shall not issue an immigrant visa pursuant to section 9 or 10 to an immigrant other than an entrepreneur, an investor, a provincial nominee or a self-employed person unless

(a) the units of assessment awarded to that immigrant include at least one unit of assessment for the factor set out in item 4 of column I of Schedule I;

(b) the immigrant has arranged employment in Canada; or



(c) the immigrant is prepared to engage in employment in a designated occupation.

(3) A visa officer may

(a) issue an immigrant visa to an immigrant who is not awarded the number of units of assessment required by section 9 or 10 or who does not meet the requirements of subsection (1) or (2), or

(b) refuse to issue an immigrant visa to an immigrant who is awarded the number of units of assessment required by section 9 or 10,

if, in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada and those reasons have been submitted in writing to, and approved by, a senior immigration officer.

(4) [Revoked SOR/91-157.]

(5) A visa officer shall not issue an immigrant visa to an accompanying dependant of an immigrant referred to in subsection 9(1) or an assisted relative referred to in subsection 10(1) or (1.1) unless

(a) at the time the application for an immigrant visa is received by an immigration officer, the dependant or relative meets the criteria respecting age, and marital or student status set out in the definitions “dependent son” and “dependent daughter” in subsection 2(1); and

(b) at the time the visa is issued, the dependant or relative meets the criteria respecting marital or student status set out in those definitions.

### *Subsection (1)*

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another Immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an applicant with reference to the occupation represented by the

applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Fong v. Canada (Min. of Employment & Immigration)*, 11 Imm. L.R. (2d) 205, 35 F.T.R. 305, [1990] 3 F.C. 705 (Fed. T.D.).

The application for permanent residence by the applicant began with an undertaking by his sister who was a Canadian citizen and living in Canada. A confirmation of offer of employment for the applicant was also obtained and forwarded to the visa officer. The applicant was interviewed but the visa officer had no notes of that interview and did not record in the computer the results of the interview. The basis of the refusal was that the applicant did not meet the job requirement by reason of his lack of experience, his lack of management in production line experience, his poor knowledge of English and limited education and funds. The applicant failed on points. The visa officer's decision was overturned. There was no cogent evidence that the visa officer went beyond the intended job description of production line manager and the CCDO definition thereof and directed a specific line of questioning about the applicant's actual work experience in the garment industry broken down into its constituent elements, for the purpose of making an appropriate assessment with respect to the applicant's adaptability or transferability to the intended occupation. Further, the visa officer committed a breach of the duty of fairness by his failure to afford the applicant an adequate opportunity to answer the specific case against him on the issue of related experience *vis-à-vis* the job offer of production line manager. The visa officer could have done this and should have done this once it became apparent that the application was likely to fail on that score. In this case the visa officer had simply asked the applicant if there was any other information relevant to the case that had not been covered, which the applicant might wish to add for the officer's consideration. This was held to be not sufficient. Finally, the Court noted that the visa officer owed a duty to the applicant to tell him by appropriate questions of his immediate impression regarding the deficiency of proof of intended and related employment and the likely consequences thereof in order to give the applicant some opportunity of disabusing the visa officer of that crucial impression. Accordingly, the visa officer's decision was set aside and the Respondent Minister was directed to consider the application of the applicant according to the relevant provisions of the Immigration Act and Regulations.

### ***Subsection (3)***

*Chen v. Canada (Min. of Employment & Immigration)* (1993), [1994] 1 F.C. 639, 22 Imm. L.R. (2d) 213, 109 D.L.R. (4th) 560, 164 N.R. 257, 74 F.T.R. 320 (note), leave to appeal to S.C.C. granted (1994), 110 D.L.R. (4th) vii (note) (S.C.C.).

The respondent, a citizen of the Peoples' Republic of China, worked in Canada from 1983 to 1985. He subsequently worked in the United States on a temporary visa and applied in 1987 for permanent residence to Canada. He was assessed pursuant to

section 8(1)(a) of the Regulations and awarded a sufficient number of points to meet the requirements of section 9(1)(b)(i) of the Act. There was considerable delay in obtaining a security clearance. In September, 1988 the respondent's U.S. work permit expired and in December, 1988 the respondent was still waiting for his security clearance. The respondent sent a Christmas card to the immigration officer who had interviewed him enclosing, with his card, \$500 U.S. cash. The immigration officer notified her superior and the respondent was re-interviewed December 29, 1988. During the interview the subject of the apparent bribe was introduced and discussed. In accordance with section 11(3) of the Regulations, the respondent was refused an immigrant visa. Judicial review of this decision was successfully taken and the Minister appealed to the Court of Appeal.

Under section 11(3) a visa officer has the power to refuse a visa to an otherwise successful immigrant if, in his opinion, there are good reasons why the number of units of assessment awarded do not reflect the chances of the particular immigrant and his dependants of becoming successfully established in Canada.

The selection standards found in the Immigration Regulations are authorized by section 114(1)(a) of the Act and contain a number of factors in Schedule I of the Regulations. Some of the factors are economic factors and refer to the immigrant's ability to economically sustain himself or herself in Canada. Others like education, age, language, other personal attributes and attainments and suitability are broader in scope. They may be relevant to assess one's ability to economically sustain oneself, but they are not so limited. They also refer to social success, that is to say an immigrant's ability or chances of successfully establishing himself or herself socially in Canada.

The Trial Division judge defined the selection standards in the Regulations and Schedule I as economic factors and therefore unduly narrowed the statutory test.

A visa officer can exercise discretion under section 11(3) if there are good reasons why the number of units do not reflect the immigrant's chances, either economically or socially, of becoming successfully established in Canada. In determining whether there are good reasons to so conclude, the officer is required to form a personal opinion which must have an objective foundation. The words "good reasons" import a measure of objectivity in the process and ensure that the exercise of discretion under section 11(3) is justifiable and not arbitrary or capricious.

In the case at bar, the visa officer's decision could not be attacked. The respondent was not unfamiliar with appropriate standards and practices used in Canada. He had lived in Canada and the United States long enough to know that payment of a substantial sum of money to a public servant could amount to a bribe. Nor was he illiterate. In fact, he taught at McMaster University in Canada and at the University of Illinois in the United States. The immigration officials treated the bribery of one of their employees as a serious matter and indeed it was.

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed



person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the perspective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.

*Editor's Note:* See, however, section 11.1 of the Immigration Regulations.

*Gaffney v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256, 40 F.T.R. 79 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing to quash the rejection of the appellant's application for landing as an independent immigrant by a visa officer in San Francisco. The visa officer considered that his duty to assess alternative occupations was limited to a category and did not extend to occupations in other categories which an immigrant was both qualified and willing to follow. The only evidence as to what transpired at the interview was set out in the appellant's affidavit. When the appellant's counsel was apprised of the refusal letter, he wrote the Consulate General pointing out that the appellant's work experience met other definitions in the *Canadian Classification and Dictionary of Occupations* (CCDO). The visa officer replied to the effect that in the interview the appellant's entire work experience had been canvassed and that these occupations had been considered. That letter was exhibited to the appellant's affidavit in support of his motion to quash. The appellant did not, of course, depose to the truth of the contents. The visa officer's notes were exhibited to the affidavit of another Immigration officer who could not depose to the truth of the notes. The visa officer has a duty to assess an applicant with reference to the occupation represented by the applicant (or his or her spouse) as the one for which he or she is qualified and prepared to pursue in Canada. That duty extends to each such occupation. The appellant in his affidavit alleged that the visa officer had failed to assess him in a number of occupations for which he was qualified and was prepared to pursue. There was no evidence to the contrary and the appeal was allowed and the Trial Division was directed to re-hear the application for *certiorari* and *mandamus*.

*Uy v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 201, 12 Imm. L.R. (2d) 172, 121 N.R. 248, 40 F.T.R. 80 (note) (C.A.).

This is an appeal from the Trial Division which refused *certiorari* quashing the refusal by a visa officer of the appellant's independent application. The appellant had been a qualified medical doctor in the Philippines and was a resident in pediatrics in the United States when he applied for admission to Canada as a medical technologist. The visa officer refused to assess him in respect of that occupation because he did not believe that the appellant would pursue the occupation in Canada. In doing so, the visa officer erred in law. There was no suggestion in this case that the visa officer had assessed the appellant for the occupation of medical technologist. The visa officer awarded him 70 or more units and then invoked section 11(3) of the Regulations by reason of his conclusion as to the appellant's intentions. Section 6 of the Act requires a visa officer to assess any immigrant who applies for landing in the manner prescribed by the Act and Regulations. Section 8(1) of the Regulations imposes in mandatory terms a duty to assess and nothing in either the Act or Regulations permits a visa officer to refuse to assess in respect of the occupation or alternative occupations which the immigrant states he or she intends to pursue in Canada. The general discretion given a visa officer by section 9(1) of the Regulations must be subordinated to the particular discretion given by section 11(3) where, notwithstanding the award of at least 70 units, the visa officer is of the opinion that those units do not reflect the chances of the particular immigrant becoming successfully established in Canada. The reasons for that opinion must be committed to writing and submitted to and approved by a senior Immigration officer. Accordingly, the appeal was allowed.

*Wang v. Canada (Min. of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 178, 121 N.R. 243, 40 F.T.R. 239 (note) (Fed. C.A.).

This was an appeal from a decision of the Trial Division refusing *certiorari* to quash the decision of a visa officer rejecting the appellant's independent application. The refusal letter is the decision which is the subject of the application for prerogative relief and is properly to be considered by the Court. It is evidence of the decision made by the visa officer and the reasons he made it but it is not conclusive evidence of whether he arrived at his decision in a manner required by law. In this case, whether the visa officer really did consider the evidence of the appellant's experience or whether he dealt with the application as he did to avoid a refusal under section 11(3) of the Regulations, would require the concurrence of a senior Immigration officer. Any presumption that the proceedings were fairly conducted and in accordance with the law is rebuttable by extraneous evidence, in this case the appellant's deposition. Second, in this case as in many others, an Immigration officer, not the visa officer who made the decision, made an affidavit attaching as an exhibit a memorandum made by the visa officer who made the decision refusing the applicant's application. The trial judge, before whom this matter had originally been argued, ordered that the memorandum be struck from the record. The Court, on the appeal by the applicant from the Trial Division's refusal of the motion for *certiorari*, confirmed that there was no justification for deviating from evidentiary norms in these applications. There is no justice in according one witness to the proceeding an opportunity to present evidence in a manner that precludes it being tested by cross-examination. Given that visa officers inhabit premises in which may be found other functionaries before whom affidavits may be sworn, there is no practical reason why

the visa officer's version of the truth cannot with equal convenience be produced in an affidavit. A disappointed applicant, who wishes to cross-examine a visa officer, will be exercising this right at some considerable expense and this provided some guarantee that the right of cross-examination would not be exercised in a frivolous manner. In this particular case the appeal was allowed.

*Zeng v. Canada (Min. of Employment & Immigration)* (1989), 27 F.T.R. 56 (Fed. T.D.).

Sections 9 and 11(3) of the Regulation empower the visa officer to refuse even those applicants who have achieved the necessary number of points. Three things follow from this:

1. The first is that Parliament has recognized the ability to successfully establish oneself in Canada as a consideration that may outweigh other factors, including the acquisition of the required number of points in every category.
2. If the officer enjoys a discretion to refuse those who have amassed a high number of points, it follows even more strongly that he has the discretion to refuse applicants whose point total is below the required minimum.
3. Where the officer acts within this discretion, his decision is beyond the reach of a motion or *certiorari* whether or not the Court would have reached the same result as the officer.

**11.1 For the purpose of determining whether an immigrant and the immigrant's dependants will be able to become successfully established in Canada, a visa officer is not required to conduct an interview unless, based on a review of the visa application and the documents submitted in support thereof,**

**(a) the immigrant is an immigrant described in paragraph 8(1)(a) and is awarded, for the factors set out in column I of items 1 to 8 of Schedule I, including, where required by these Regulations, at least one unit of assessment for each of the factors set out in column I of items 3 and 4 of that Schedule,**

- (i) at least 60 units of assessment, where the immigrant is not an assisted relative,
- (ii) at least 55 units of assessment, where the immigrant is an assisted relative referred to in paragraph 10(1)(b),
- (iii) at least 45 units of assessment, where the immigrant is an assisted relative referred to in clause 10(1.1)(d)(i)(A), and
- (iv) at least 50 units of assessment, where the immigrant is an assisted relative referred to in clause 10(1.1)(d)(i)(B); or

**(b) the immigrant is an entrepreneur, an investor, a provincial nominee or a self-employed person.**



*Baluyut v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 420, 56 F.T.R. 186 (Fed. T.D.).

The applicant sought to quash a decision by a visa officer refusing to interview her in support of her application for permanent residence without the personal appearance of her spouse at the interview. The applicant is a citizen of the Philippines who had been living by herself in the United States and working there as a registered nurse. Her husband and their two children lived in the Philippines. The applicant applied as a principal applicant for permanent residence in Canada and listed her husband and children as her dependants. The applicant was notified to attend a personal interview to determine her admissibility. She was required to bring her spouse to the interview. The applicant advised the Canadian Consulate in Los Angeles that her husband would be unable to attend the interview. She had an application for an H-1 visa pending and thus her husband would have difficulty obtaining a visa to the United States. Through her counsel she suggested that her husband be interviewed at the Canadian Embassy in Manila. Eventually this suggestion was rejected and the applicant was informed that both she and her husband would be required to attend in Los Angeles on the date scheduled for the interview. The applicant attended by herself at the Canadian Consulate. The officer assigned to deal with her case refused to proceed with the interview. The applicant explained why her husband could not attend and the visa officer spoke to a Vice Consul about what decision she should make and then carried out the Vice Consul's instructions. The decision of the visa officer was set aside. The Court found that the visa officer had failed to exercise her own discretion and had thereby committed jurisdictional error. The Court found on the facts that the visa officer had simply carried out the instructions of her superior with respect to the conduct of the interviews and had not made the decision herself. In so doing the visa officer had committed jurisdictional error and her decision to refuse the interview was quashed. *Mandamus* was directed to the respondent Minister's officials at the Consulate in Los Angeles directing them to interview the applicant and to then transfer the file to Manila so that the spouse and dependants could be interviewed.

### **Prescribed Classes of Immigrants for the Purposes of Subsections 6(5) and (8) of the Act**

**11.2 The following classes are prescribed as classes of immigrants for the purposes of subsections 6(5) and (8) of the Act:**

- (a) the live-in caregivers in Canada class; and**
- (b) the post-determination refugee claimants in Canada class.**

**11.3 A member of the live-in caregivers in Canada class and the member's dependants, if any, are subject to the following landing requirements:**

- (a) the member must not have been admitted to Canada as a live-in caregiver by reason of any misrepresentation of the education, training or experience requirements referred to in paragraph 20(1.1)(a) or (b), whether the misrepresentation was made by the member or by another person;**
- (b) the member must not be, and no dependant of the member is, a person**

described in section 19 of the Act, as determined by an immigration officer pursuant to subsection 6(8) of the Act;

(c) the member must have submitted an application for landing to an immigration officer; and

(d) where the member or a dependant of the member was the subject of an inquiry under the Act, a conditional removal order or removal order must not have been made against the member or dependant or, if such an order was made, it must have been quashed.

*Caletena v. Canada (Solicitor General)* (1994), 23 Imm. L.R. (2d) 177, 74 F.T.R. 78.

The applicant was admitted to Canada on May 5, 1989 as a member of the "Live-in Caregivers in Canada" class. Since that time she had been employed as a nanny on both a full-time and part-time basis, as a chambermaid by the Convention Inn in Edmonton and as a part-time receptionist. On May 14, 1993 her application for permanent residence was accepted subject to medical examinations. On September 27, 1993 she was informed that two of her infant children failed to pass their medical examinations. Accordingly, her application for permanent residence was refused and a voluntary departure notice was issued and her temporary employment authorization was terminated effective November 1, 1993.

Applicants under the Live-in Caregivers Program are not attempting to gain entry or remain in Canada by failing to comply with our laws. The program is designed to assist workers who are invited to enter Canada on employment authorizations. There is the implication, at least, that those administering the program will encourage and assist people, such as the applicant, to upgrade their skills and seek permanent residence. In the present case, the applicant did all that was expected of her as a foreign domestic worker. She was gainfully employed and by all accounts a highly satisfactory employee.

The applicant wished to contest the medical evidence but had not been afforded an opportunity to know what it was or to make answer to it prior to the respondent's decision of September 27, 1993. Accordingly, in view of the unique nature of the foreign domestic program, the applicant was permitted to remain in Canada and continue her employment until such time as the leave application for judicial review was perfected.

*Turingan v. Canada (Min. of Employment & Immigration)* (1993), 72 F.T.R. 316.

The applicant came to Canada from the Philippines and worked as a live-in caregiver. During most of the period she resided with her respective employers. In July, 1992, however, she began to experience sharp stomach pain associated with a previously diagnosed peptic ulcer. She found that she could relieve the pain on a diet of rice, vegetables, fish and meat while her employer's family preferred pasta dishes. Embarrassed at the prospect of imposing her diet on her employer's family, she began to have supper and stay over at her friend's apartment, returning to work the next day. The applicant's application for permanent residence was refused on the basis that she did not meet the requirements of the Live-in Caregiver Program because she had not worked as a live-in caregiver the required twenty-four months. It was conceded by counsel for the Minister that there had been a mistake in the calculation of the length of time and both parties were in agreement that the application should be allowed.

The Court noted, however, that the primary purpose of the Live-in Caregiver Program was to encourage people to come to Canada to fill a void which exists in our labour market. In consideration for their commitment to work in the domestic field, the Program's participants are virtually guaranteed permanent residence status provided that they work the required twenty-four-month period. The immigration officer, therefore, had limited discretion to refuse permanent residence status once it had been determined that the participant had worked the required twenty-four months.

The applicant had provided a credible explanation about her living arrangements during the period of her stomach illness. The Court questioned the merits of the Department taking a harsh stance in this type of application. If the Department, however, intended to adopt a strict interpretation of the Program requirements, the basic principles of fairness required that the Department inform the applicant of its conclusions and afford her an opportunity to correct her breach before compelling her to leave the country.

The purpose of the Live-in Caregiver Program is to facilitate the attainment of permanent residence status. It is therefore incumbent on the Department to adopt a flexible and constructive approach in its dealings with the Program's participants. The Department's role is not to deny permanent residence on merely technical grounds, but rather to work with, and assist the participants in reaching their goal of permanent residence status.

**11.4 (1) A member of the post-determination refugee claimants in Canada class and the member's dependants, if any, are subject to the following landing requirements:**

- (a) the member must not be, and no dependant of the member is, a person described in any of paragraphs 19(1)(c) to (g) and (j) to (l) and (2)(a) or subparagraph 19(2)(a.1)(i) of the Act, as determined by an immigration officer pursuant to subsection 6(8) of the Act;
- (b) the member must not have been, and no dependant of the member has been, convicted of an offence referred to in paragraph 27(2)(d) of the Act for which a term of imprisonment of more than six months has been imposed or a maximum term of imprisonment of five years or more may be imposed;
- (c) the member must have been in Canada on the day on which the member became a member of the post-determination refugee claimants in Canada class and must have remained in Canada since that day; and
- (d) the member must be in possession of a valid and subsisting passport or travel document or satisfactory identity documents.

(2) For the purposes of subsection 6(5) of the Act, a person who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee shall be deemed to have submitted an application for landing as a member of the post-determination refugee claimants in Canada class to an immigration officer on the day that the determination is made.

(3) Subject to subsection (4), the landing requirements referred to in subsection (1) shall not be applied before the expiration of the 15-day period immediately following notification by the Refugee Division to a person that the



person is not a Convention refugee, so that the person may make written submissions to an immigration officer respecting the matters referred to in paragraph (c) of the definition “member of the post-determination refugee claimants in Canada class” in subsection 2(1).

(4) Where a person referred to in subsection (2) is, following a determination by the Refugee Division that the person is not a Convention refugee, the subject of an application for leave to commence an application for judicial review under the *Federal Court Act* or of an application for judicial review, an immigration officer is not required to make a determination respecting the person’s application for landing until

- (a) the Federal Court — Trial Division has denied the application for leave or the application for judicial review;
- (b) the Federal Court of Appeal has, on appeal of a judgment of the Federal Court — Trial Division respecting the application for judicial review, made a decision that is not in the favour of the person; or
- (c) the Supreme Court of Canada has, on appeal of a judgment of the Federal Court of Appeal respecting the application for judicial review, made a decision that is not in the favour of the person.

(5) A person referred to in subsection (2) may make one further written submission to an immigration officer respecting the matters referred to in paragraph (c) of the definition “member of the post-determination refugee claimants in Canada class” in subsection 2(1) within one of the following periods:

- (a) where the Federal Court — Trial Division has denied the application for leave to commence an application for judicial review, 15 days after the period allowed for the filing of a notice of appeal of the judgment of that Court;
- (b) where the Federal Court — Trial Division has denied the application for judicial review and that Court has not at the time of rendering judgment certified that a serious question of general importance is involved, 15 days after the pronouncement of the judgment of that Court;
- (c) where the judgment of the Federal Court — Trial Division is appealed to the Federal Court of Appeal and the Court of Appeal has made a decision that is not in favour of the person, 15 days after the expiration of the 60 day period allowed for the filing of a notice of application for leave to appeal the judgment to the Supreme Court of Canada; or
- (d) where the judgment of the Federal Court of Appeal is appealed to the Supreme Court of Canada and the Supreme Court has made a decision that is not in the favour of the person, 15 days after the pronouncement of the judgment of the Supreme Court.

11.41 (1) Where an immigration officer has reasonable grounds to believe that a member of a prescribed class of immigrants referred to in section 11.2

or a dependant of the member has committed an offence referred to in paragraph 19(1)(c) or (2)(a), subparagraph 19(2)(b)(i) or paragraph 27(1)(d) of the Act, the immigration officer is not required to make a determination respecting the member's application for landing

(a) for a period of up to one year after the application for landing has been submitted to the immigration officer, so that charges may be laid against the member or the dependant of the member; or

(b) where charges are laid against the member or the dependant of the member, until the courts have made a final determination in respect of the charges.

(2) Subsection (1) does not apply to a member of the post-determination refugee claimants in Canada class or a dependant of the member where an immigration officer has reasonable grounds to believe that the member or the dependant has committed the offences referred to in subparagraph 19(2)(b)(i) of the Act.

#### Prescribed Date for the Purposes of Subsection 7(1) of the Act

11.5 The Minister shall cause the immigration plan for the next calendar year to be laid before each House of Parliament not later than June 30 of each calendar year.

#### Examination of Immigrants at Ports of Entry

12. An immigrant who has been issued a visa and who appears before an immigration officer at a port of entry for examination pursuant to subsection 12(1) of the Act is required

- (a) if his marital status has changed since the visa was issued to him, or
- (b) if any other facts relevant to the issuance of the visa have changed since the visa was issued to him or were not disclosed at the time of issue thereof,

to establish that at the time of the examination

- (c) the immigrant and the immigrant's dependants, whether accompanying dependants or not, where a visa was issued to the immigrant pursuant to subsection 6(1), section 9 or subsection 10(1) or (1.1) or 11(3) or (4), or
- (d) the immigrant and the immigrant's accompanying dependants, in any other case,

meet the requirements of the Act, these Regulations, the *Indochinese Designated Class Regulations*, the *Self-Exiled Persons Class Regulations* or the *Political Prisoners and Oppressed Persons Designated Class Regulations*, including the requirements for the issuance of the visa.

*Canada (Min. of Employment & Immigration) v. De Decaro*, [1993] 2 F.C. 408, 103 D.L.R. (4th) 564, 155 N.R. 129 (C.A.).

In October 1988 a visa officer issued an immigrant visa to Ignazio De Decaro. He also issued an immigrant visa to two dependants who were to accompany Mr. De Decaro, namely the respondent and her daughter. Ignazio De Decaro died before coming to Canada. The respondent did come and arrived at Dorval on July 11, 1989 accompanied by her daughter and another child, who was born in the U.S. after Ignazio De Decaro's death and which child had never obtained a visa to Canada.

The respondent then applied for landing for herself and her two children. This was denied on the ground that the respondent's admission contravened section 19(2)(d) of the *Immigration Act* because the respondent did not meet the requirements of section 9(1) of the Act.

The adjudicator found that when the respondent applied for admission to Canada, she held a valid immigrant's visa since her visa had not been revoked by the proper authorities. The adjudicator found that the respondent's husband's death did not automatically invalidate the visa. Further, the adjudicator found that there was no need to refer to section 12 of the Regulations because that provision did not enact a condition of admission, consequently its infringement did not mean the respondent could not be admitted.

The Appeal Division of the I.R.B. dismissed the Minister's appeal on the basis that the respondent, before appearing at a port of entry, had duly obtained an immigrant visa which had never been revoked or cancelled by the proper authorities and thus the respondent had the right to be admitted to Canada unless she was inadmissible on some other ground than the lack of a valid visa.

The Minister's appeal to the Court of Appeal was allowed. Pratte J.A. held that the definition of "accompanying dependant" illustrated that the visa issued to a person in this class was of a very special type which was issued solely to enable its holder to accompany or follow another person to Canada. The holder of such a visa who applied for admission without the other person accompanying or preceding him or her into Canada did not therefore meet the requirements of section 9(1) of the Act.

Further, after her husband's death the respondent became inadmissible by virtue of section 12 of the Regulations. Her marital status had changed since she obtained her visa and in order to be admitted to Canada she had to establish not only that she was eligible, but also that she met all the conditions for obtaining a visa. The respondent never discharged this burden of proof.

Marceau J.A. agreed that the decision of the Appeal Division should be set aside. He saw no reference in the Act or Regulations to visas which become invalid, are revoked or become ineffective. The technique in his view used to cover cases of changes in the immigrant's status between the time the visa is issued and the time he or she arrives at the Canadian border is contained in section 12 of the Regulations. In his view, issuing an immigrant visa is not the granting of landing. Such issuance simply means that the visa officer has formed the opinion that the applicant meets the requirements of the Act and Regulations for admission to Canada. The visa is evidence of a conclusion by an immigration officer whose function is to determine from outside Canada whether applicants are admissible and that conclusion will usually be accepted by his or her colleague at the port of entry. However, the rule is still that a foreign national arriving in Canada with a view to residing here must satisfy the immigration officer of his



admissibility at the port of entry. Section 12 of the Regulations imposes on an immigrant a duty to disclose any change in the facts which may have influenced the issuing of the visa and if there has been such a change, it requires the immigrant to meet new requirements. The visa is not void, but the visa in itself does not confer the right of entry. It is the new requirements of section 12 of the Regulations that must be met.

In Marceau J.A.'s view the respondent could not establish that she met the requirements of section 12 since she was granted a visa in consideration of her husband's presence. The adjudicator accordingly was wrong to think that she met the conditions of admission set out by the Regulation and the Appeal Division could not confirm the adjudicator's finding on the ground that the Minister had not discharged the burden of proving that the respondent was inadmissible or that her visa had been cancelled, as the Minister was under no burden of proof and cancellation of a visa as a concept does not exist.

Given that the Court intended to allow the appeal, it then had to consider section 73(3). The majority was of the view that the respondent before her husband's death possessed a valid visa. However, after that death it was impossible for the condition attached to the visa to be performed so that the visa ceased to have any validity. Accordingly, section 73(3) conferred no right of appeal to the Appeal Division on the respondent.

Marceau J.A. was of the view that the respondent was in possession of a valid visa and that the matter should be returned to the Appeal Division as it was still under a duty to consider whether on compassionate or humanitarian grounds the respondent should not be removed from Canada.

### **Members of a Crew**

#### **12.1 (1) The following classes of persons are not members of a crew:**

- (a) members of a crew who have deserted;**
- (b) members of a crew whom an immigration officer believes on reasonable grounds have deserted;**
- (c) members of a crew who are hospitalized and who fail to return to the vehicle or to leave Canada within 72 hours after leaving the hospital or within such longer period as may be specified by an immigration officer; and**
- (d) members of a crew who have been discharged or are otherwise unable or unwilling to perform the duties of a member of a crew and who fail to leave Canada within 72 hours after the discharge or inability or unwillingness to perform those duties or within such longer period as may be specified by an immigration officer.**

#### **(2) The following classes of persons who are conveyed on a vehicle are not members of a crew:**

- (a) persons whose fare is waived in exchange for work to be performed during the voyage;**
- (b) persons who are on board the vehicle for a purpose other than that of performing duties that relate to the operation of the vehicle and who are**

not normally on board the vehicle but who, pursuant to a service contract with a transportation company, perform maintenance or repairs while the vehicle is in Canada or during the voyage; and

(c) any other person who is on board the vehicle for a purpose other than that of performing duties that relate to the operation of the vehicle or the provision of services to passengers or members of the crew.

### Alternate Manners of Examination

12.2 For the purposes of subsection 12(1) of the Act, the following classes of persons may be examined in a manner approved by the Minister instead of appearing before an immigration officer at a port of entry:

(a) members of a crew of a ship that transports oil or liquid natural gas and that docks at a production installation or artificial island to which the *Canadian Laws Offshore Application Act* applies, for the purpose of loading oil or liquid natural gas;

(b) persons who leave Canada and proceed directly to a production installation or artificial island to which the *Canadian Laws Offshore Application Act* applies, and return directly to Canada from the production installation or artificial island without entering the territorial waters of a foreign state;

(c) members of a crew of a ship of foreign registry, other than members of a crew referred to in paragraph (a);

(d) members of a crew of a ship of Canadian registry.

(e) Canadian citizens or permanent residents who are seeking to come into Canada at remote locations after being outside Canada for no longer than 72 hours, where no immigration officer is assigned or where there is no means by which the persons may report for examination;

(f) United States citizens or permanent residents who seek to come into Canada at remote locations, where no immigration officer is assigned or where there are no means by which the persons may report for examination;

(g) citizens or permanent residents of Canada or the United States who seek to come into Canada at places other than a port of entry, where no immigration officer is assigned but where the persons have access to an immigration or customs office by means of a telephone or other means of telecommunication; and

(h) persons who are seeking to come into Canada at a port of entry where facilities are in place for automatic screening of persons seeking to come into Canada.

### Visitors' Visas

13. (1) A visitor who is a person referred to in Schedule II is not required

to make an application for and obtain a visa before he appears at a port of entry.

(2) A visa officer may issue a visitor's visa to any person who meets the requirements of the Act and these Regulations if that person establishes to the satisfaction of the visa officer that he will be able

- (a) to return to the country from which he seeks to come to Canada; or
- (b) to go from Canada to some other country.

(3) A diplomatic or consular officer of Canada may, while he is outside Canada, issue a visa to any person who in Canada may be granted privileges or immunities in accordance with the law of Canada as a representative or official of a foreign government or international organization.

(4) Every visitor who is required to obtain a visa, student authorization or employment authorization before he appears at a port of entry shall be in possession of a valid visa, student authorization or employment authorization, as the case may be, when he appears at a port of entry.

#### *Subsection (1)*

*Okadia v. Min. of Employment & Immigration* (1983), 5 D.L.R. (4th) 187, 55 N.R. 116 (Fed. C.A.).

Section 13(1) of the Immigration Regulations and Schedule II to that Regulation are not discriminatory and do not infringe the Canadian Charter of Rights.

#### *Subsection (2)*

*De La Cruz v. Min. of Employment & Immigration* (1988), 26 F.T.R. 285, 7 Imm. L.R. (2d) 75 (T.D.).

The applicants were citizens of the Philippines. They applied for permanent residence in Canada at the Canadian Consulate General in San Francisco. The applicants were scheduled to be interviewed in San Francisco; however, their applications for tourist visas to the United States were refused by the United States Embassy in Manila. They, therefore, decided to apply at the Consulate in Toronto for a United States visa.

The application for visitors' visas made at the Canadian Embassy in Manila was refused. This decision was upheld. The duty of the visa officer is to accord proper consideration to any application. The officer is not required to issue a visitor's visa unless convinced that the applicant fulfils the legislative requirements. Once the visa officer turns his mind to the issue and disposes of the application for visitors' visas, there remains no duty to be performed that is enforceable by *mandamus*.

To succeed on an application for *certiorari*, the applicants must do more than establish the possibility that the Court might have reached a different conclusion than the visa officer. There must be either an error of law apparent on the face of the record or a breach of the duty of fairness appropriate to this essentially administrative decision. It is not improper for the visa officer to refuse the visitors' visas on the basis of an outstanding application for permanent residence. It is the intent of the applicant that is properly the



focus of the visa officer's examination. No policy dictates refusal simply because the applicants intend to apply for United States visas. Further, the officer had not based his decision solely on the refusal of United States officials to grant the applicants' request for visas to the United States. Accordingly, the decision of the visa officer was upheld.

*Kahlon v. Min. of Employment & Immigration*, [1986] 3 F.C. 386 (Fed. C.A.), reversing [1985] 2 F.C. 124 (Fed. T.D.).

The applicant sponsored his relatives' family class application for permanent residence. The application was denied and the applicant appealed to the Immigration Appeal Board. The visa officer refused to issue visitors' visas to the relatives who were required as witnesses at his appeal. The visas were refused on the basis that the applicants were not *bona fide* visitors because their intention was to testify at the applicant's appeal. An order of *mandamus* was issued requiring the Minister to grant the relatives visitors' visas to allow them to testify at the appeal. This order was reversed on appeal. *Mandamus* will issue to require performance of a duty; it cannot, however, dictate the result to be reached. *Certiorari* might have been available to quash the refusal of the visitors' visas and to refer the matter back for reconsideration but the respondent had not sought this type of order.

### Passports and Travel Documents

**14. (1) Subject to subsection (2), every immigrant shall be in possession of**

**(a) a valid and subsisting passport issued to that immigrant by the country of which he is a citizen or national, other than a diplomatic, official or other similar passport;**

**(b) a valid and subsisting travel document issued to that immigrant by the country of which he is a citizen or national;**

**(c) a valid and subsisting identity or travel document**

**(i) that was issued to that immigrant by a country, and**

**(ii) that is of the type issued to non-national residents of the country of issue, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality, or who have no country of citizenship or nationality; or**

**(d) a valid and subsisting identity or travel document issued to that immigrant and specified in item 1 of Schedule VII.**

**(2) Subsection (1) does not apply to a person who is a Convention refugee seeking resettlement and is in possession of a valid and subsisting immigrant visa where, in the opinion of the visa officer who issued the immigrant visa, it would, in practice, be impossible for that person to obtain a passport or an identity or travel document.**

**(3) Subject to subsection (4), every visitor shall be in possession of**

**(a) a valid and subsisting passport valid for travel to Canada, issued to that**

visitor by the country of which he is a citizen or national and recognized by the country of issue as giving that visitor the right to enter the country of issue;

(b) a valid and subsisting travel document issued to that visitor by the country of which he is a citizen or national and recognized by the country of issue as giving that visitor the right to enter the country of issue;

(c) a valid and subsisting identity or travel document that

(i) was issued to that visitor by a country,

(ii) is recognized by the country of issue as giving that visitor the right to enter the country of issue, and

(iii) is of the type issued to non-national residents of the country of issue, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality, or who have no country of citizenship or nationality; or

(d) a valid and subsisting identity or travel document issued to that visitor and specified in item 2 of Schedule VII.

(4) Subsection (3) does not apply to

(a) a visitor who is a citizen of the United States;

(b) a visitor seeking entry from the United States or St. Pierre and Miquelon who has been lawfully admitted to the United States for permanent residence;

(c) a visitor seeking entry from Greenland who is a resident of Greenland;

(d) a visitor seeking entry from St. Pierre and Miquelon who is a citizen of France and a resident of St. Pierre and Miquelon;

(e) a member of the armed forces of a country that is a designated state for the purposes of the *Visiting Forces Act* who is seeking entry in order to carry out his official duties, other than a person who has been designated as a civilian component of that visiting force; or

(f) a visitor who is seeking entry as or in order to become a member of the crew of a vehicle and who is in possession of a seaman's identity document issued to him pursuant to International Labour Organization conventions, or an airline flight crew licence or crew member certificate issued to him in accordance with International Civil Aviation Organization specifications.

(5) A passport, identity or travel document specified in item 3 of Schedule VII is not a valid and subsisting passport, identity or travel document for the purposes of subsections (1) and (3).

(6) Every visitor seeking entry may be required to produce sufficient documentary evidence to establish to the satisfaction of an immigration officer that he will be able to return to the country from which he seeks entry or to go from Canada to some other country.

### Student Authorizations

**14.1** Subject to sections 14.2 and 14.3, no person, other than a Canadian citizen or a permanent resident, shall attend any university or college or take any academic, professional or vocational training course in Canada unless that person possesses a valid and subsisting student authorization.

**14.2** Section 14.1 does not apply to a person who seeks to come into Canada for the purpose of attending a university or college, or taking an academic, professional or vocational training course or a person in Canada who is attending or seeks to attend a university or college or is taking or seeks to take an academic, professional or vocational training course if

- (a) the person is the dependant of any diplomatic or consular officer, representative or official, properly accredited, of a country other than Canada or of the United Nations or any of its agencies or of any intergovernmental organization of which Canada is a member who is coming into or is in Canada to carry out official duties or any member of the staff of that officer, representative or official, or
- (b) the sole course taken or to be taken is a French or English language training course that is three months or less in duration.

**14.3 (1)** There shall be exempt from the requirement to obtain a student authorization, for any of the purposes referred to in section 14.1, any person

- (a) who was in Canada on January 1, 1989 or had, prior to that date, been directed to return to the United States pursuant to subsection 23(5) of the Act to await the availability of an adjudicator to preside at an inquiry to be held on or after that date; and
- (b) whose intention to make a claim to be a Convention refugee was signified by the person before January 1, 1989 to
  - (i) an immigration officer, who recorded that intention before that date, or a person acting on an immigration officer's behalf, who an immigration officer is satisfied recorded that intention before that date, or
  - (ii) an adjudicator in the course of an inquiry respecting the person's status in Canada.

**(2)** No exemption under subsection (1) applies to a person who

- (a) has been determined to be a Convention refugee under the Act as it read before January 1, 1989;
- (b) is the subject of a removal order or a departure order and has not been removed from, or has not otherwise left, Canada;
- (c) has failed to appear for
  - (i) completion, pursuant to paragraph 12(3)(a) of the Act, of an examination,



(ii) an inquiry respecting that person's status in Canada, or for the continuation of such an inquiry, where the person was given an appointment therefor, or

(iii) an examination under oath with respect to the person's claim to be a Convention refugee, or for the continuation of such an examination, where the person was given an appointment therefor; or

(d) is described in paragraph 19(1)(c), (e), (f), (g) or (j) or 27(2)(c) of the Act.

(3) There shall be exempt from the requirement to obtain a student authorization, for any of the purposes referred to in section 14.1, any person who is a dependant of a person exempt under subsection (1).

15. (1) Every application for a student authorization shall be accompanied by

(a) a letter from a university, college or other institution referred to in paragraph 10(a) or (b) of the Act accepting the applicant to attend or to take any specified course at the university, college or other institution;

(b) sufficient documentation to enable an immigration officer to satisfy himself that the applicant has sufficient financial resources available to him, without engaging in employment in Canada,

(i) to pay his tuition fees,

(ii) to maintain himself and any dependants who will come into Canada during the period for which he seeks a student authorization, and

(iii) to pay the transportation costs to and from Canada for himself and any dependants referred to in subparagraph (ii); and

(c) the consent in writing of the government of the province in which the applicant wishes to study where such consent is required by that government pursuant to an agreement entered into by the Minister with that government pursuant to section 108 of the Act.

(1.1) Subparagraph 15(1)(b)(ii) does not apply in respect of an application submitted by

(a) a person whose claim to Convention refugee status has been referred to the Refugee Division pursuant to subsection 46.02(2) or 46.03(5) of the Act, as amended by S.C. 1988, c. 35, section 14; or

(b) a dependant of a person referred to in paragraph (a).

(2) A person who seeks to come into Canada for a purpose referred to in paragraph 10(a) or (b) of the Act is not required to obtain a student authorization before that person appears at a port of entry if that person is a dependant of

(a) [Revoked SOR/89-38.]

(b) a member of the armed forces of a country that is a designated state for the purposes of the *Visiting Forces Act* who is coming to or is in Canada in order to carry out his official duties, including a person who has been designated as a civilian component of that visiting force;

(c) a clergyman or member of a religious order coming to or in Canada for the temporary carrying out of his religious duties;

(d) an employee of a foreign news company coming to or in Canada for the purpose of reporting on Canadian events;

(e) a person coming to or in Canada to engage in athletic or other sport activities or events as a player, manager, coach, trainer or administrative employee for a Canadian-based team, group or organization or a person engaged as a referee, umpire or other similar official with respect to any athletic or other sport activity or event in Canada;

(f) a person in possession of a valid and subsisting student authorization;

(g) a person in possession of a valid and subsisting employment authorization;  
or

(h) a representative of a foreign government sent by that government to take up duties with a federal or provincial agency pursuant to an exchange agreement with Canada.

(3) A person who seeks to come into Canada for a purpose referred to in paragraph 10(a) or (b) of the Act is not required to obtain a student authorization before that person appears at a port of entry if that person is

(a) a national of the United States;

(b) a person who has been lawfully admitted to the United States for permanent residence;

(c) a resident of Greenland;

(d) a resident of St. Pierre and Miquelon; or

(e) a person whose application for a student authorization has been approved in writing by a visa officer but to whom the authorization has not been issued.

16. (1) A person in Canada may make an application for the purpose of obtaining a student authorization

(a) if that person is

(i) a person referred to in subsection 15(2),

(ii) a person in possession of a valid and subsisting student authorization,

(iii) a person in possession of a permit issued by the Minister under section 37 of the Act or a dependant of that person,

(iv) a person whose claim to Convention refugee status has been referred to the Refugee Division but the claim has not been finally determined,

(v) a dependant of a person referred to in subparagraph (iv), or

(vi) a person referred to in paragraph 15(3)(e);

(b) where the taking of the course for the purpose of which he makes an

application for a student authorization would only be incidental and secondary to the main purpose of his presence in Canada; or  
(c) if that person has been authorized to remain in Canada as a visitor pursuant to subsection 27(2.1) of the Act and was in possession of a valid and subsisting student authorization at the time the person ceased to be a visitor.

(2) [Revoked SOR/80-601.]

*Subsection (1)*

*Kouchaki v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-3070-83, November 29, 1984.

The applicant is the plaintiff in a civil action seeking a declaration that the reason for the refusal of the extension of his student visa was unlawful and that the plaintiff was entitled to remain in Canada to study, effective September 30, 1983. The plaintiff also sought the quashing of the departure notice issued at the conclusion of the inquiry herein. Where the validity of the deportation order is not in question prohibition will not lie to permit the applicant to exhaust all legal remedies. However, if the Minister wishes to refuse extensions, this must be done fairly which implies the giving of a reason for the refusal. Because the action questions the validity of the decision to refuse to renew a student visa and raises substantial issues, justice required that the applicant be permitted to remain in Canada until trial.

*Kouchaki v. Min. of Employment & Immigration; Shamsvandi v. Min. of Employment & Immigration*, Fed. T.D., Doc. Nos. T-3070-83, T-3096-83, April 6, 1984.

Both of these cases were applications for an interlocutory interim order prohibiting the defendant from proceeding with an inquiry. The plaintiffs entered Canada in 1981 and were authorized to study. Various extensions of this authorization were granted. On September 30, 1983 a further extension was refused and a direction for inquiry was issued and separate inquiries commenced in November 1983. In the main actions the plaintiffs are attacking the validity of the defendants' refusal to extend their authorizations to study. Pending final disposition of these actions, the interlocutory interim order was sought prohibiting the conduct of the inquiry.

An individual permitted to enter Canada to pursue a course of study should, normally, have his student authorization extended to enable him to complete those studies. Where it is alleged that the individual is conducting himself in a manner which is inconsistent with his student status the respondent minister is under a duty to act in accordance with the provisions of this Act. Further, the Court does not have a general power to suspend the performance of a statutory duty in cases where the performance of the statutory duty might have an adverse affect on some right which the applicant has sought to assert in another forum. Section 51 of the Immigration Act specifies the cases in which the execution of a removal order may be stayed. By implication this section excludes any other stay of execution, including one in the exercise of judicial discretion.

The Court should not issue an order directing the respondent not to proceed with an inquiry which he is under a statutory duty to hold solely because the applicants have not exhausted legal remedies available to them.



17. (1) A student authorization may not be obtained by any person for the purpose of taking any academic, professional or vocational training course unless that course

- (a) is of at least six months duration and at the rate of at least twenty-four hours of instruction per week;
- (b) is given at any institution described in paragraph 10(a) of the Act or any other publicly-funded institution;
- (c) is recommended by a minister of the Government of Canada, other than the Minister of Employment and Immigration, or by a minister of the government of any province or by any agency of the Government of Canada or the government of any province;
- (d) is incidental and secondary to the main purpose of that person's presence in Canada; or
- (e) involves upgrading of skills or language training and is given at an institution that operates under a provincial or federal licence.

(2) No visitor may be granted entry for the purpose of taking any academic, professional or vocational training course at any university, college or other institution listed in Schedule III.

### Employment Authorizations

18. (1) Subject to subsections 19(1) to (2.2), no person, other than a Canadian citizen or permanent resident, shall engage or continue in employment in Canada without a valid and subsisting employment authorization.

(2) No person who is in possession of a valid and subsisting employment authorization shall continue in employment in Canada unless he complies with each of the terms and conditions specified in the authorization.

19. (1) Subsection 18(1) does not apply to a person who seeks to come into Canada for the purpose of engaging in employment or a person in Canada who seeks to engage or continue in employment

- (a) as a properly accredited diplomat, consular officer, representative or official
  - (i) of a country, other than Canada,
  - (ii) of the United Nations or any of its agencies, or
  - (iii) of any intergovernmental organization in which Canada participates,
- or

as a member of the suite of any such diplomat, consular officer, representative or official;

- (b) as a member of the armed forces of a country that is a designated state for the purposes of the *Visiting Forces Act*, including a person who has been

designated as a civilian component of that visiting force pursuant to paragraph 4(c) of that Act;

(c) as a clergyman, a member of a religious order or a lay person to assist a congregation or a group in the achievement of its spiritual goals where the duties to be performed by that person will consist mainly of preaching of doctrine, presiding at liturgical functions or spiritual counselling;

(d) as a performing artist, a member of a group of performing artists or a member of the staff of the performing artists or the group, where the artist or the group and the staff that accompanies the artist or the group, as the case may be, number not less than 15;

(e) as a member of the crew of a vehicle of foreign ownership or foreign registry engaged predominantly in the international transportation of goods or passengers;

(f) as an employee of a foreign news company for the purpose of reporting on Canadian events;

(g) as a representative of a business carrying on activities outside Canada or of a foreign government for the purpose of purchasing Canadian goods or services for that business or foreign government, including a person coming to or in Canada for the purpose of

(i) inspecting, during or after manufacturing, the quality of the goods purchased, or

(ii) acquiring training or familiarization with the goods or services purchased,

where that representative will not be actively engaged in production of goods or services in Canada;

(h) as a representative of a business carrying on activities outside Canada or of a foreign government coming to or in Canada for a period of less than 90 days for the purpose of selling goods for that business or foreign government, where that representative will not be engaged in making sales to the general public;

(i) as a permanent employee of a corporation, union or other organization carrying on business or operating outside Canada who is coming to or in Canada for a period of less than 90 days for the purpose of consulting with other employees or members of that corporation, union or other organization, or inspecting a Canadian branch office or headquarters on behalf of that corporation, union or other organization;

(j) for the purpose of rendering emergency medical or other services for the preservation of life or property;

(k) as a member of a non-Canadian-based team to engage or assist in sport activities or events or as an individual participant to engage in sport activities or events other than as a referee, umpire or similar official;

(l) as a judge, referee or similar official in an international sporting event

organized by an international amateur sporting association and hosted by a Canadian organization;

(m) as a judge at an animal show competition;

(n) as an external examiner of a degree-qualifying thesis or project;

(o) as a guest speaker for the sole purpose of making a speech or delivering a paper at a dinner, graduation, convention or similar function;

(p) as an expert witness for the sole purpose of testifying in proceedings before a regulatory board or tribunal or a court;

(q) as a permanently employed personal servant coming into or in Canada for a period of less than 90 days for the purpose of performing his regular duties with his employer during the latter's sojourn in Canada;

(r) as an officer of a foreign government sent by his government to take up duties with a federal or provincial agency pursuant to an exchange agreement with Canada;

(s) as a medical elective or clinical clerk at a Canadian medical teaching institution, where that person will merely be observing clinical or medical procedures;

(t) as a trainee with a Canadian parent or subsidiary corporation, where that trainee will not be actively engaged in the production of goods or services;

(u) as an executive of the organizing committee of a convention or meeting or as a member of the administrative support staff of such a committee who is permanently employed by the organization holding the convention or meeting;

(v) as a person who pursuant to paragraphs 1 to 3 under the heading "Canada" in Annex 1502.1 of the Agreement as defined in section 2 of the *Canada-United States Free Trade Agreement Implementation Act* is exempted from the requirement to obtain an employment authorization; or

(w) as a person who, pursuant to paragraphs 1 to 5 under Annex 1603.A of the Agreement, as defined in subsection 2(1) of the *North American Free Trade Agreement Implementation Act*, is exempted from the requirement to obtain an employment authorization.

(1.1) The operation of paragraph (1)(v) is suspended during the period in which paragraph (1)(w) is in force.

(2) Notwithstanding subsection (1), no person described in that subsection may engage or continue in employment in Canada in any secondary employment without an employment authorization.

(2.1) There shall be exempt from the requirement to obtain an employment authorization, for any of the purposes referred to in subsection 18(1), any person who seeks to engage or continue in employment in Canada in an occupation other than an occupation in which the protection of public health is essential and who is a person, or a dependant of a person, exempt under subsection 14.3(1).



(2.2) There shall be exempt from the requirement to obtain an employment authorization, for any of the purposes referred to in subsection 18(1), any person, or a dependant of a person,

- (a) who is exempt under subsection 14.3(1);
- (b) who seeks to engage or continue in employment in Canada in an occupation in which the protection of public health is essential; and
- (c) who has undergone a medical examination and is in possession of a valid and subsisting certificate of medical assessment signed by a medical officer and stating that in the opinion of the medical officer the person is not suffering from any disease, disorder, disability or other health impairment that may endanger public health.

(3) A person who seeks to come into Canada for a purpose referred to in paragraph 10(c) of the Act, other than a person referred to in subsection (1), may apply for an employment authorization at a port of entry if

(a) that person is

- (i) a national of the United States,
- (ii) a person who has been lawfully admitted to the United States for permanent residence,
- (iii) a resident of St. Pierre and Miquelon or Greenland,
- (iv) a person referred to in paragraph 4(d), (f), (g) or (h) or 20(5)(b) or (d),
- (v) a person whose application for an employment authorization has been approved in writing by a visa officer but to whom the authorization has not been issued, or
- (vi) a person referred to in paragraph 20(5)(e), other than a person who is seeking to come into Canada for the purpose of establishing a business in Canada; and

(b) except in the case of a person described in paragraph 20(5)(b), (d) or (e), the person possesses sufficient documentation to enable an immigration officer to form an opinion for the purposes of paragraph 20(1)(a).

(c) [Revoked SOR/93-412.]

(4) A person in Canada may make an application for the purpose of obtaining an employment authorization if he is

- (a) a person referred to in paragraph (1)(a), (b), (c), (f) or (r) or a dependant of that person;
- (b) a person who is in possession of a valid and subsisting student authorization or a dependant of that person;
- (c) a person who is in possession of a valid and subsisting employment authorization or a dependant of that person;
- (d) a person engaged in sport activities or events as a player, manager, coach,

trainer or administrative employee of a Canadian based team, group or organization or a dependant of that person or a person engaged as a referee, umpire or other similar official with respect to any sport activity or event in Canada;

(e) the holder of a permit referred to in section 37 of the Act or a dependant of that person;

(f) a person required in Canada to carry out emergency repairs to industrial equipment in order to prevent disruption of employment;

(g) a person who is a member of the crew of a ship of foreign ownership or foreign registry that is operated in Canadian waters;

(h) a person under contract to fulfill a single or continuous guest engagement in the performing arts, except where the engagement is merely incidental to a commercial activity that does not limit itself to artistic presentation or constitutes employment in a permanent position in a Canadian organization;

(i) a person who has applied for an exemption pursuant to section 2.1 and who has been referred by an immigration officer for a determination of whether the person is a member of an inadmissible class, where the application for exemption has not been refused;

(j) a person who has been determined to be a Convention refugee

(i) under these Regulations, or

(ii) under section 69.1 of the Act, as amended by S.C. 1988, c. 35, section 18, by the Refugee Division;

(k) a person who, in the opinion of an immigration officer, could not otherwise subsist without public assistance and who

(i) has made a claim referred to in subsection 41(1) of the Act that he is a Canadian citizen, which claim has not been finally determined,

(ii) has been made a claim to be a Convention refugee that has been referred to the Refugee Division before February 1, 1993, pursuant to subsection 46.02(2) or 46.03(1) of the Act as that subsection read before February 1, 1993, which claim has not been finally determined,

(iii) is a person with respect to whom the execution of a removal order has been stayed by the Board,

(iv) is a person against whom a removal order has been made that cannot be executed,

(v) is a person referred to in paragraph 50(1)(b) of the Act with respect to whom the Minister has stayed the execution of a removal order or a person whose presence is required in Canada in any criminal proceedings, or

(vi) is a person awaiting the determination of an appeal under the Act commenced with respect to a removal order or a conditional removal order made against that person; or

(vii) is a person who is a visitor, entered Canada on or before August

31, 1990, has not left Canada for more than seven consecutive days since that date and is awaiting the determination of the person's application made pursuant to section 5 of the *Self-Exiled Persons Designated Class Regulations*.

(l) a person who has been authorized to remain in Canada as a visitor pursuant to subsection 27(2.1) of the Act and was in possession of a valid and subsisting employment authorization at the time the person ceased to be a visitor;

(m) a person referred to in subparagraph (3)(a)(v);

(n) a member of the post-determination refugee claimants in Canada class or a dependant of the member, where the dependant was in Canada on the day on which that member became a member of the post-determination refugee claimants in Canada class;

(o) a member of the live-in caregivers in Canada class or a dependant of the member, where the dependant was in Canada on the day on which that member became a member of the live-in caregivers in Canada class;

(p) a national of the United States described in paragraphs 6 to 9 under the heading "Canada" in Annex 1502.1 of the Agreement as defined in subsection 2(1) of the *Canada-United States Free Trade Agreement Implementation Act*;

(q) a person who has made a claim to be a Convention refugee that has been referred to the Refugee Division pursuant to section 46.02 of the Act but that has not been finally determined, and who

(i) could not otherwise subsist without public assistance,

(ii) has undergone, and whose dependants in Canada have undergone, a medical examination by a medical officer, the results of which have been submitted by the medical officer to an immigration officer,

(iii) has been photographed and fingerprinted pursuant to paragraph 44(e), and

(iv) has submitted to the Board the form referred to in subrule 14(2) of the *Convention Refugee Determination Division Rules*; or

(r) a person who, following a determination by the Refugee Division that the person is not a Convention refugee, applies for leave to commence an application for judicial review under the *Federal Court Act* or for judicial review, and who

(i) could not otherwise subsist without public assistance,

(ii) has undergone, and whose dependants in Canada have undergone, a medical examination by a medical officer, the results of which have been submitted by the medical officer to an immigration officer, and

(iii) has been photographed and fingerprinted pursuant to paragraph 44(e).

(5) [Revoked SOR/84-849.]



**Subsection (2)**

*Canada (Min. of Employment and Immigration) v. O'Brien* (1993), 22 Imm. L.R. (2d) 28, 161 N.R. 141 (Fed. C.A.).

The respondent, an American citizen, was authorized by an employment authorization to work as a treasurer of the Detroit/Windsor Tunnel Company. During a strike by employees of the Canadian subsidiary — the Detroit/Windsor Subway Company — the respondent, along with several Canadian supervisors, engaged in collecting tolls and inspecting vehicles for hazardous materials. On appeal it was held that these extra duties forced upon the respondent by the strike did not constitute secondary employment because they were duties normally expected to be done by management employees in an extraordinary situation.

In the context of this case the Court referred to the Canadian Classification and Dictionary of Occupations ("CCDO") as an internal document of the Department that was not useful in this proceeding because it was vague, imprecise, did not easily fit all categories of occupations in the actual world of employment and was unsatisfactory as an arbitrary definition of occupations.

**Subsection (4)**

*Sharoni v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1002-88, November 30, 1988.

This application for an order of *mandamus* directing the respondent Minister to issue a work authorization pursuant to sections 20(5)(a) and 19(4)(k)(v) of the Regulation was dismissed. Mr. Sharoni arrived at a Toronto immigration office on May 17, 1988. He indicated that he had been in Canada illegally since 1985 and intended to pursue a claim for refugee status. On May 20, 1988, the applicant returned to the immigration office and asked for a work permit. He indicated that he had been charged with a criminal offence and was released on a recognizance. It was his submission that he had thereby become a person whose presence was required in a criminal proceeding. Section 19(4)(k)(v) of the Regulation did not benefit the applicant because it was confined to those whose presence was required as a witness in criminal proceedings.

*Piperno v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-101-84, February 3, 1984.

The following decision illustrates how the Court will analyse applications for *mandamus* directed to an immigration officer to compel the issuance of an employment authorization. The regulations have changed since this decision was granted; thus, the reasoning process may be more important than the resolution of the application.

The applicant claimed refugee status in Canada, his claim had been denied and there was an application before the Immigration Appeal Board for redetermination of the claim. The applicant had obtained two offers of part-time employment. He made two applications for an employment authorization and both were refused. *Mandamus* was denied because the immigration officer had a discretion with respect to issuing the employment authorization. There was no evidence of bad faith, and, thus, the officer in refusing could not be said to have breached his duty to act fairly towards the applicant. There was no evidence that regulatory provisions enacted for the applicant's protection

had not been observed. Finally, the discretion could not be said to have been exercised on a wrong principle because the officer gave no reasons in refusing the authorization. The fact that no reasons were given could not be attacked because the Act did not require the officer to give reasons for refusing the authorization.

**19.1 (1) An employment authorization issued to a person referred to in paragraph 19(4)(q) is subject to terms and conditions respecting**

- (a) the types of employment in which the person may engage;**
- (b) prohibitions against attending any university, college or other institution and against taking any academic, professional or vocational training course at any university, college or other institution; and**
- (c) evidence of compliance with the terms or conditions that the employment authorization is subject to.**

**(2) An employment authorization issued to a person referred to in paragraph 19(4)(r) is subject to terms and conditions respecting**

- (a) the types of employment in which the person may engage;**
- (b) the identity and location of the employer with which the person may engage or continue in employment;**
- (c) prohibitions against attending any university, college or other institution and against taking any academic, professional or vocational training course at any university, college or other institution; and**
- (d) evidence of compliance with the terms or conditions that the employment authorization is subject to.**

**19.2 (1) Subject to subsection (2), an employment authorization issued to a person referred to in paragraph 19(4)(q) is valid for the lesser of the period beginning on the day on which**

- (a) the employment authorization is issued and ending on the day on which, following a Refugee Division determination that the person is not a Convention refugee, an immigration officer determines that the person is not a member of the post-determination refugee claimants in Canada class;**
- (b) the employment authorization is issued and ending on the day on which the Refugee Division determines that the person has abandoned the claim; and**
- (c) the person's claim to be a Convention refugee was referred to the Refugee Division pursuant to section 46.02 of the Act and ending nine months after that date.**

**(2) An immigration officer may extend the period of validity referred to in paragraph (1)(c) where the Minister or the Refugee Division is responsible for any significant delay in the hearing or determination of the claim.**

**(3) An employment authorization issued to a person referred to in paragraph 19(4)(r) is valid until the day on which**

- (a) the Federal Court—Trial Division denies the application for leave to commence an application for judicial review; or
- (b) following a final judicial determination that the person is not a Convention refugee, an immigration officer determines that the person is not a member of the post-determination refugee claimants in Canada class.

20. (1) An immigration officer shall not issue an employment authorization to a person if,

- (a) in his opinion, employment of the person in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada; or
- (b) the issue of the employment authorization will affect
  - (i) the settlement of any labour dispute that is in progress at the place or intended place of employment, or
  - (ii) the employment of any person who is involved in such a dispute.

(1.1) An immigration officer shall not issue an employment authorization to any person who seeks admission to Canada as a live-in caregiver unless the person

- (a) has successfully completed a course of study that is equivalent to successful completion of Canadian secondary school;
- (b) has the following training or experience, in a field or occupation related to the employment for which the employment authorization is sought, namely,
  - (i) successful completion of six months of full-time training in a classroom setting, as part of the course of study referred to in paragraph (a) or otherwise, or
  - (ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in that field or occupation within the three years immediately prior to the day on which the person submits an application for an employment authorization to a visa officer; and

(c) has the ability to speak, read and understand English or French at a level sufficient to communicate effectively in an unsupervised setting.

(1.11) Paragraphs (1.1)(a) and (b) are retroactive and apply in respect of all applications for employment authorizations made by persons seeking admission to Canada as a live-in caregiver pending on April 15, 1994.

(1.2) An immigration officer shall not issue an employment authorization to a person referred to in paragraph 19(4)(q) or (r) if the medical examination of the person or any of the person's dependants in Canada is incomplete.

(2) An immigration officer shall not issue an employment authorization to any person who has previously engaged in employment in Canada without



proper authorization or has contravened the terms or conditions of a previous employment authorization unless the immigration officer is satisfied that

- (a) a period of one year has elapsed since the previous engagement or contravention ceased;
- (b) the previous engagement or contravention was unintentional or was excusable for any other reason;
- (c) in the case of a person described in paragraph 19(4)(i), (j) or (k), that person could not subsist without public assistance if he did not have an employment authorization; or
- (d) in the case of a person referred to in paragraph 19(4)(e)
  - (i) whose country of last permanent residence before he came to Canada is in a state of war or experiencing serious disruption of public order,
  - (ii) whose place of last permanent residence before he came to Canada has recently experienced a serious natural disaster, or
  - (iii) who was, immediately prior to coming to Canada, a member of a class designated by the Governor in Council pursuant to paragraph 114(1)(d) of the Act,

that person could not otherwise subsist without public assistance.

(3) In order to form an opinion for the purposes of paragraph (1)(a), an immigration officer shall consider

- (a) whether the prospective employer has made reasonable efforts to hire or train Canadian citizens or permanent residents for the employment with respect to which an employment authorization is sought;
- (b) the qualifications and experience of the applicant for the employment for which the employment authorization is sought;
- (c) whether the wages and working conditions offered are sufficient to attract and retain in employment Canadian citizens or permanent residents.

(4) Where an immigration officer considers the questions set out in paragraphs (3)(a) and (c), he shall take into consideration the opinion of an officer of the office of the National Employment Service serving the area in which the person seeking an employment authorization wishes to engage in employment.

(5) Notwithstanding paragraph (1)(a) and subsections (3) and (4), an immigration officer may issue an employment and authorization to

- (a) a person described in paragraph 19(4)(f), (h), (i), (j), (k), (n), (o), (q) or (r);
- (b) a person coming to or in Canada to engage in employment pursuant to
  - (i) an international agreement between Canada and one or more foreign

countries or an arrangement entered into with one or more foreign countries by the Government of Canada or by or on behalf of one of the provinces, other than an arrangement concerning seasonal workers, or  
(ii) an agreement entered into with a province or group of provinces by the Minister pursuant to subsection 108(2) of the Act;

(c) a person in possession of a valid and subsisting student authorization in respect of whom paragraph (1)(a) should not, in the opinion of the immigration officer, be applied for the reason that that person has become temporarily destitute through circumstances totally beyond the control of that person and of any person on whom that person is dependent for the financial resources referred to in paragraph 15(1)(b);

(d) a person whose employment is related to a research, educational or training program approved by the Minister;

(e) a person in respect of whom paragraph (1)(a) should not, in the opinion of the immigration officer, be applied for the reason that

(i) his employment will create or maintain significant employment, benefits or opportunities for Canadian citizens or permanent residents,

(ii) he is to be employed by a Canadian religious or charitable organization without remuneration, or

(iii) his employment would result in reciprocal employment of Canadian citizens in other countries; or

(f) a person described in paragraph 19(4)(e) and in respect of whom paragraph (1)(a) should not, in the opinion of an immigration officer, be applied for humanitarian or compassionate reasons arising from

(i) a state of war or other event causing serious disruption of public order in that person's country of last permanent residence before he came to Canada,

(ii) a recent serious natural disaster at that person's place of last permanent residence before he came to Canada, or

(iii) the fact that the person was, immediately prior to his coming to Canada, a member of a class designated by the Governor in Council pursuant to paragraph 114(1)(d) of the Act.

### *Subsection (2)*

*Piperno v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-101-84, February 3, 1984.

The following decision illustrates how the Court will analyse applications for *mandamus* directed to an immigration officer to compel the issuance of an employment authorization. The regulations have changed since this decision was granted; thus, the reviewing process may be more important than the resolution of the application.

The applicant claimed refugee status in Canada, his claim had been denied and

there was an application before the Immigration Appeal Board for redetermination of the claim. The applicant had obtained two offers of part-time employment. He made two applications for an employment authorization and both were refused. *Mandamus* was denied because the immigration officer had a discretion with respect to issuing the employment authorization. There was no evidence of bad faith, and, thus, the officer in refusing could not be said to have breached his duty to act fairly towards the applicant. There was no evidence that regulatory provisions enacted for the applicant's protection had not been observed. Finally, the discretion could not be said to have been exercised on a wrong principle because the officer gave no reasons in refusing the authorization. The fact that no reasons were given could not be attacked because the Act did not require the officer to give reasons for refusing the authorization.

### **Subsection (5)**

*Sharoni v. Min. of Employment & Immigration*, Fed. T.D., Doc. No. T-1002-88, November 30, 1988.

This application for an order of *mandamus* directing the respondent Minister to issue a work authorization pursuant to sections 20(5)(a) and 19(4)(k)(v) of the Regulation was dismissed. Mr. Sharoni arrived at a Toronto immigration office on May 17, 1988. He indicated that he had been in Canada illegally since 1985 and intended to pursue a claim for refugee status. On May 20, 1988, the applicant returned to the immigration office and asked for a work permit. He indicated that he had been charged with a criminal offence and was released on a recognizance. It was his submission that he had thereby become a person whose presence was required in a criminal proceeding. Section 19(4)(k)(v) of the Regulation did not benefit the applicant because it was confined to those whose presence was required as a witness in criminal proceedings.

## **Medical Examinations**

**21. (1) Subject to subsections (2) and (3), the following classes of visitors shall undergo a medical examination by a medical officer:**

**(a) persons seeking to engage or continue in employment in Canada in an occupation in which protection of public health is essential; and**

**(b) persons who**

**(i) are seeking entry or extension of their visitor's status for an aggregate period in excess of six consecutive months, including an actual or proposed period of absence from Canada of less than 14 days, and**

**(ii) have resided or sojourned, at any time during the one year period immediately preceding the date of seeking entry, for six consecutive months, in an area that in the opinion of the Minister of National Health and Welfare has a higher incidence of serious communicable disease than Canada.**

**(2) Subsection (1) does not apply to**

**(a) a person described in paragraph 19(1)(a) who is coming to or is in Canada**



to carry out his official duties unless that person seeks to engage or continue in secondary employment in Canada;

(b) a dependant of a person described in paragraph 19(1)(a) unless that dependant seeks to engage or continue in employment in Canada; or

(c) a member of the armed forces of a country that is a designated state for the purposes of the *Visiting Forces Act* coming to or in Canada in order to carry out his official duties, other than a person who has been designated as a civilian component of that visiting force, unless that member seeks to engage or continue in secondary employment in Canada.

(d) and (e) [Revoked SOR/87-594.]

(3) Every person who has undergone an examination pursuant to subsection (1) is not required to undergo a further examination unless that person has resided or sojourned since the examination outside Canada for a period in excess of six consecutive months.

(4) Every person of a class referred to in subsection (1) who is seeking entry shall, when he appears at a port of entry, be in possession of a valid certificate of medical assessment stating that the person is not a member of a class described in paragraph 19(1)(a) of the Act.

22. For the purpose of determining whether any person is or is likely to be a danger to public health or to public safety or whether the admission of any person would cause or might reasonably be expected to cause excessive demands on health or social services, the following factors shall be considered by a medical officer in relation to the nature, severity or probable duration of any disease, disorder, disability or other health impairment from which the person is suffering, namely,

(a) any reports made by a medical practitioner with respect to the person;

(b) the degree to which the disease, disorder, disability or other impairment may be communicated to other persons;

(c) whether medical surveillance is required for reasons of public health;

(d) whether sudden incapacity or unpredictable or unusual behaviour may create a danger to public safety;

(e) whether the supply of health or social services that the person may require in Canada is limited to such an extent that

(i) the use of such services by the person might reasonably be expected to prevent or delay provision of those services to Canadian citizens or permanent residents, or

(ii) the use of such services may not be available or accessible to the person;

(f) whether medical care or hospitalization is required;

(g) whether potential employability or productivity is affected; and

(h) whether prompt and effective medical treatment can be provided.

*Gao v. Canada (Min. of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 306 (Fed. T.D.).

This was an application for judicial review to quash a decision of an immigration officer which found the applicant inadmissible under 19(1)(a)(ii) of the Immigration Act on the ground that his young son suffered from a disability. The applicant entered Canada as a visiting scholar and was issued student and employment authorizations in 1984. He returned to China in 1985 and was allegedly persecuted for his participation in pro-democracy activities. In December, 1985 he returned to Canada on a student visa to complete his studies. In early 1986 his wife and son arrived in Canada on visitors' visas. The son had been assessed in Shanghai and found healthy and assessed M1. In the fall of 1987 the son began attending a special school because of developmental delay and was required to undergo a second medical assessment. The son was diagnosed "mental retardation". The prognosis was "guarded".

In January, 1988 an opinion signed by two concurring medical officers classified the applicant's son as M7 (medically inadmissible). In July of 1988 the applicant claimed Convention refugee status and fell under the "backlog" rules. In February, 1990 he was called to a preliminary interview and a third medical assessment was ordered. This report made no mention of mental retardation. In May of 1990 Health and Welfare Canada requested extensive specific information with respect to the son's mental development. The son was then referred to the Glendale Lodge Society where an intensive medical, psychological, hearing and speech profile was carried out. The ensuing report was forwarded to Health and Welfare Canada in September, 1990. In December, 1991 the applicant was informed that his son was still medically inadmissible. The respondent Minister submitted affidavit evidence which established that the Glendale report was reviewed on December 12, 1990. The son was assessed at M5 (also inadmissible). The evidence was that Immigration was notified of this assessment in November, 1991. The applicant was not made aware of the December, 1990 assessment of the Glendale report or of its communication to Immigration in November, 1991 nor did he receive the second medical notification arising from that assessment.

The governing principle arising from the jurisprudence is that the reviewing Court is not competent to make findings of fact related to medical diagnosis but is competent to review the evidence to determine whether the medical officers' opinion is reasonable in the circumstances of the case. The reasonableness of the opinion is to be assessed, not only when it was given, but also at the time when it was relied upon by the immigration officer since it is that decision which is being reviewed. The grounds of reasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence, or failure to consider the factors stipulated in section 22 of the Regulations.

The medical opinion of 1988 was unreasonable at the time it was relied upon in December, 1991. Health and Welfare's assessment of the Glendale report led to an M5 assessment which was inconsistent with the M7 assessment in 1988. The contradictory information should have alerted the officer to the need for further investigation. He or she should have called for an updated examination of the son and a full second medical opinion that would take into account all of the factors in section 22 of the Regulations.

Further, the last information the applicant had was the hopeful Glendale assessment. The applicant was not given an opportunity to respond to the negative assessment of that report by Health and Welfare Canada and this was held to be unfair.

*Bola v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 14, 107 N.R. 311 (Fed. C.A.).

The majority agreed that the Court of Appeal should refrain from intervening to contradict an honest assessment by the Immigration and Refugee Board of the sufficiency of a medical certificate on the basis of which the visa officer abroad had formed an opinion so long as the assessment was not tainted by any misconception of the law or any patently erroneous understanding of the medical officer's expressed statement of opinion.

The Court of Appeal is sitting in appeal and its role is not to re-do what the Board did as if it was, itself, a second Immigration and Refugee Board. In this particular case, the majority thought that the Board's reasons were clear and accurate as to the law and that the analysis of the medical certificate was carefully made and accordingly the appeal was dismissed.

*Canada (Min. of Employment & Immigration) v. Jiwanpuri* (1990), 10 Imm. L.R. (2d) 241, 109 N.R. 293 (Fed. C.A.).

The visa officer refused to grant the applications for landing which the respondent had sponsored on behalf of her father and her sister. The respondent disputed the refusal and the Immigration and Refugee Board allowed the appeal, a decision from which the Minister appealed to the Court. Members of the Board do not have the expertise required to question the correctness of the medical diagnosis reached by the medical officers. Even with the help of medical witnesses, it is not a function of the Board to do so. The Board is not expected to make a choice between the written opinion of the medical officers and that of other doctors as to the diagnosis of a medical condition of an applicant for landing. The Act has made membership in the inadmissible class in section 19(1)(a) the immediate consequence of the expressed opinion of two medical officers, without providing for a different result, if other doctors could be found who would be of a different opinion. In this case, the Board was therefore wrong in finding that, in the case of the father, the diagnosis of mental retardation was erroneous and incorrect; however, it is within the province of the Board to inquire into the reasonableness of the opinion, although that reasonableness is to be assessed at the time when the visa officer made his decision since it is that decision which is being appealed. The reasonableness of the opinion is not to be assessed strictly on the basis of the facts as they appear to the visa officers or the medical officers and is open to the appellant to show that those facts were wrongly seen or interpreted or that they were insufficient to lead to the conclusion drawn. The decision of the Board, taken as a whole in this case, was to the effect that the opinion of the medical officers was unreasonable. The factors which medical officers must take into account are set out in section 22 of the Regulations. The medical officers, in arriving at their opinion, applied only one relevant factor as set out in section 22. They also applied a number of factors which are not set out in the regulations. Accordingly, the Board was justified in concluding that their opinion was not reasonable.

*Sall v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 179, 29 F.T.R. 176 (Fed. T.D.).

The applicants were refused permanent residence status on medical grounds. In upholding this decision, the Court relied on *Mohamed v. Min. of Employment & Immigration*, [1986] 3 F.C. 90 (C.A.) which observed that it was open to the applicant



to show that the medical officer's opinion was unreasonable. The Court further observed that evidence which simply tended to show that the person was no longer suffering from the medical condition which formed the basis of the medical officer's opinion was not sufficient. The decision of *Stefanska v. Min. of Employment & Immigration* (1988), 6 Imm. L.R. (2d) 66 (Fed. T.D.) observed that the decision must be made by a duly constituted authority acting without abuse of power, in good faith and with objectivity. The Court observed that the diagnosis stated in the medical notification was accurate and fully supported the opinion of the physicians who signed it that these were questions of fact and not of law. Where the entries in the medical notification were so inconsistent with each other that they made the document as a whole incoherent, then, of course, such a medical notification would not constitute the opinion of a medical officer.

*Badwal v. Canada (Min. of Employment & Immigration)* (1989), 9 Imm. L.R. (2d) 85, 64 D.L.R. (4th) 561 (Fed. C.A.).

The appellant's father was refused a visa for admission to Canada for health reasons. The Immigration Appeal Board upheld the visa officer's decision and dismissed the appeal. The Federal Court of Appeal allowed the appeal because of the wording of the medical narrative. Certainty in prognosis is not required. The Act requires an expression of probabilities. The use of the word "may" does not automatically mean that the narrative is insufficient where the medical narrative makes excessive demands on the health or social system contingent upon deterioration of the appellant's current state. The corollary must be that, in the absence of deterioration, there will be no excessive demands. Parliament requires a judgment of probability based upon an appreciation of the applicant's present condition. Where the narrative does not address the probability of deterioration, the opinion that the sponsored father's presence in Canada will make excessive demands on the health or social system is self-contradictory.

*Canada (Min. of Employment & Immigration) v. Pattar* (1989), 8 Imm. L.R. (2d) 79, 98 N.R. 98 (Fed. C.A.).

It is open to the Board to determine whether a particular medical certificate contains on its face the clear expression of the medical opinion required to give effect to the inadmissibility in section 19(1)(a) of the Act. In doing so, the Board must look to the whole document and the mere reading of the word "possible" in the description of the prognosis in the narrative of the profile does not lead determinatively to a conclusion of insufficiency.

*Min. of Employment & Immigration v. Sihota* (1989), 8 Imm. L.R. (2d) 1 (Fed. C.A.).

This was an appeal by the Minister of Employment and Immigration from a decision of the Immigration Appeal Board that allowed the respondent's appeal against the refusal of the sponsored application of her father for landing in Canada. The Board erred by finding confusion in the medical notification where none existed. Fairly read, the medical notification clearly supported the visa officer's conclusion and no other. The other ailments disclosed in the notification were not susceptible to the description expressed in the narrative of the medical notification as a "condition which is likely to endanger public health." "Pulmonary tuberculosis possibly active" is amenable to that description. Section 22 of the Immigration Regulations requires only that the medical notification address

specifically and clearly those diseases which alone or in combination are relevant to the opinion under section 19(1)(a) of the Act.

*Lee v. Canada (Min. of Employment & Immigration)* (1986), 4 F.T.R. 86 (Fed. T.D.).

Early in 1984, the applicant, Sing Lee, of Hong Kong, made an application for permanent residence in Canada for himself and for four of his children, one of whom was the applicant, Hon Man Lee. Hon Man Lee was a congenital deaf mute and he was rejected on medical grounds. This decision was quashed because both medical officers had failed to consider medical reports, which had been provided by the applicant, prior to certifying that the applicant, Hon Man Lee, was medically inadmissible. This failure to consider these reports was a breach of the duty of fairness, which the respondents owed the applicant.

### Interviews

**22.1 (1) An immigration officer may require that an applicant for landing who is in Canada, or an applicant for an immigrant visa, and dependants of the applicant, if any, be interviewed for the purpose of assessing the application.**

**(2) An immigration officer may require that an applicant for a visitor visa, student authorization or employment authorization and accompanying dependants of the applicant, if any, be interviewed for the purpose of assessing the application.**

**(3) An interview referred to in subsection (1) or (2) shall be conducted**

**(a) where the application is submitted to a visa office, in that visa office or at any appropriate location specified by a visa officer; or**

**(b) where the application is submitted in Canada, at the location where the application is submitted or at any other appropriate location specified by an immigration officer.**

*Baluyut v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 420, 56 F.T.R. 186 (Fed. T.D.).

The applicant sought to quash a decision by a visa officer refusing to interview her in support of her application for permanent residence without the personal appearance of her spouse at the interview. The applicant is a citizen of the Philippines who had been living by herself in the United States and working there as a registered nurse. Her husband and their two children lived in the Philippines. The applicant applied as a principal applicant for permanent residence in Canada and listed her husband and children as her dependants. The applicant was notified to attend a personal interview to determine her admissibility. She was required to bring her spouse to the interview. The applicant advised the Canadian Consulate in Los Angeles that her husband would be unable to attend the interview. She had an application for an H-1 visa pending and thus her husband would have difficulty obtaining a visa to the United States. Through her counsel she suggested that her husband be interviewed at the Canadian Embassy in Manila. Eventually

this suggestion was rejected and the applicant was informed that both she and her husband would be required to attend in Los Angeles on the date scheduled for the interview. The applicant attended by herself at the Canadian Consulate. The officer assigned to deal with her case refused to proceed with the interview. The applicant explained why her husband could not attend and the visa officer spoke to a Vice Consul about what decision she should make and then carried out the Vice Consul's instructions. The decision of the visa officer was set aside. The Court found that the visa officer had failed to exercise her own discretion and had thereby committed jurisdictional error. The Court found on the facts that the visa officer had simply carried out the instructions of her superior with respect to the conduct of the interviews and had not made the decision herself. In so doing the visa officer had committed jurisdictional error and her decision to refuse the interview was quashed. *Mandamus* was directed to the respondent Minister's officials at the Consulate in Los Angeles directing them to interview the applicant and to then transfer the file to Manila so that the spouse and dependants could be interviewed.

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the perspective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.



### Terms and Conditions of Admission

23. (1) Subject to section 23.1, where an immigration officer, senior immigration officer or adjudicator may impose conditions under the Act in respect of an immigrant, the only terms and conditions that may be imposed are the following:

(a) the times and places at which the immigrant shall report for medical examination, surveillance or treatment;

(b) where the immigrant is an investor other than an investor in a province and has made a minimum investment referred to in paragraph (c) or (d) of the definition “minimum investment” in subsection 2(1), that the immigrant not revoke that investment during the period starting on the day of the immigrant’s landing and ending on the last day of

(i) in the case of a minimum investment referred to in paragraph (c) of the definition “minimum investment” in subsection 2(1), the period of at least five years referred to in that paragraph, and

(ii) in the case of a minimum investment referred to in paragraph (d) of the definition “minimum investment” in subsection 2(1), the minimum holding period;

(b.1) where the immigrant is an investor in a province and has made a minimum investment referred to in paragraph (e) of the definition “minimum investment” in subsection 2(1), that the immigrant not revoke that investment during the period starting on the day of the immigrant’s landing and ending on the last day of the period of at least five years referred to in paragraph (e) of that definition;

(c) the times and places at which the immigrant shall furnish evidence of compliance with the terms or conditions imposed.

(2) [Revoked SOR/93-412.]

(3) Where an immigration officer, senior immigration officer or adjudicator may impose conditions under the Act in respect of a visitor, the only terms and conditions that may be imposed are the following:

(a) a prohibition against engaging in employment in Canada;

(b) a prohibition against attending any university, college or other institution and against taking any academic, professional or vocational training course at any university, college or other institution;

(c) attendance at a university, college or other institution specified by the immigration officer, senior immigration officer or adjudicator;

(d) the type of employment in which the visitor may engage;

(e) the employer with which the visitor may engage or continue in employment;

(f) the location in which the visitor may engage or continue in employment;

- (g) the period during which the visitor may engage or continue in employment;
- (h) the period during which the visitor may remain in Canada;
- (i) the area within which the visitor may travel in Canada;
- (j) where the visitor is granted entry to become a member of a crew of a vehicle, the period within which the visitor shall join the vehicle;
- (k) the times and places at which the visitor shall report for medical examination, surveillance or treatment or for any other purpose;
- (l) the times and places at which the visitor shall furnish evidence of compliance with the terms or conditions imposed; and
- (m) a prohibition against attending any university, college or other institution listed in Schedule III and against taking any academic, professional or vocational training course at any university, college or other institution listed in that Schedule.

23.1 (1) Entrepreneurs and their dependants are prescribed as a class of immigrants in respect of which landing shall be granted subject to the condition that, within a period of not more than two years after the date of an entrepreneur's landing, the entrepreneur

- (a) establishes, purchases or makes a substantial investment in a business or commercial venture in Canada so as to make a significant contribution to the economy and whereby employment opportunities in Canada are created or continued for one or more Canadian citizens or permanent residents, other than the entrepreneur and the entrepreneur's dependants;
- (b) participates actively and on an on-going basis in the management of the business or commercial venture referred to in paragraph (a);
- (c) furnishes, at the times and places specified by an immigration officer, evidence of efforts to comply with the terms and conditions imposed pursuant to paragraphs (a) and (b); and
- (d) furnishes, at the time and place specified by an immigration officer, evidence of compliance with the terms and conditions imposed pursuant to paragraphs (a) and (b).

(2) Fiancées of sponsors and dependants of fiancées are prescribed as a class of immigrants in respect of which landing shall be granted subject to the condition that

- (a) within a period of 90 days after the date of a fiancée's landing, the fiancée marries the sponsor; and
- (b) the fiancée furnishes, at the times and places specified by an immigration officer, evidence of compliance with the terms and conditions imposed.

(3) The terms and conditions set out in subsections (1) and (2) are in addition to the terms and conditions that may be imposed pursuant to subsection 23(1).

**Subsection (2)**

*Gabriel v. Min. of Employment & Immigration* (1984), 60 N.R. 108 (Fed. C.A.).

The appellant was landed on condition that she marry within 90 days. This condition could not be obeyed as a result of circumstances beyond the appellant's control. Even though a condition is impossible to fulfill, so long as the person concerned knew of that condition and continued to remain in Canada in breach of that condition, such a person has knowingly contravened a condition attached to the grant of landing. Even if the word "contravene" requires a positive act, the omission to do something which a person is required to do, is the commission of a positive act. It is an act of failure to do something required to be done and, accordingly, satisfies the definition of the term "contravenes".

**24. (1) Every application made to an immigration officer by a person pursuant to section 15 or 16 of the Act shall be in a form established by the Minister by order pursuant to paragraph 115(a) of the Act, and shall, where applicable, be accompanied by**

- (a) the documentation referred to in subsection 15(1);**
- (b) the consent in writing of the government of the province in which the applicant is hospitalized or institutionalized where such consent is required by that government pursuant to an agreement entered into by the Minister with that government pursuant to subsection 108(2) of the Act or is required by or pursuant to legislation of that province;**
- (c) any other documentation or information that the applicant considers relevant; and**
- (d) on request, any other documentation or information that an immigration officer considers necessary for the purpose of assessing the application.**

**(2) Where an application has been made pursuant to section 15 or 16 of the Act, an immigration officer may request that the applicant appear for an interview.**

### **Duration of Visitor Status**

**24.1 For the purposes of subsection 26(2) of the Act, the prescribed period is six months.**

### **Deposits and Bonds**

**25. (1) Where the Deputy Minister issues a direction to a transportation company pursuant to subsection 92(1) or (2) of the Act requiring it to deposit a security other than a sum of money in Canadian currency, the Deputy Minister may require that any security deposited be**

- (a) an irrevocable stand-by letter of credit in favour of the Government of**



Canada, the form and substance of which have been fixed by the Deputy Minister and that has been issued or confirmed by a bank as defined in section 2 of the *Bank Act*; or

(b) an irrevocable line of credit with a bank as defined in section 2 of the *Bank Act*

(i) that designates the Crown as its agent for the purposes of drawing against the line of credit to realize any amount or administration fee referred to in section 93 of the Act, and

(ii) that is accompanied by an undertaking to the Government of Canada, the form and substance of which has been fixed by the Deputy Minister and in which the transportation company undertakes

(A) not to revoke the line of credit, and

(B) not to revoke the designation of the Crown as agent.

(2) Where a senior immigration officer requires any person or group or organization of visitors to make a deposit or post a performance bond pursuant to any provision of the Act, he shall provide to that person or group or organization of visitors a receipt or other documentary record specifying the circumstances in which the deposit may be forfeited or the bond enforced.

### Returning Resident Permits

26. (1) When a permanent resident intends to leave Canada for any period of time or is outside Canada, he may make an application, orally or in writing, to an immigration officer for a returning resident permit.

(2) Subject to subsection (3), an immigration officer shall issue a returning resident permit to a permanent resident who has made an application therefor where the permanent resident

(a) has provided the immigration officer with two clearly identifiable photographs of himself;

(b) has appeared for an interview if requested by the immigration officer; and

(c) intends to leave or left Canada

(i) for the purpose of carrying out his duties as a representative or employee of a corporation or business organization established in Canada or as a representative or employee of the Government of Canada or of a province or a municipality in Canada,

(ii) for the purpose of upgrading his professional, academic or vocational qualifications,

(iii) for the purpose of accompanying a member of his family who is a Canadian citizen or has been issued a returning resident permit, or

(iv) in any circumstances not referred to in subparagraphs (i) to (iii) that the immigration officer deems appropriate.

(3) An immigration officer shall not issue a returning resident permit where the immigration officer and a senior immigration officer believe on reasonable grounds that the person applying therefor has ceased or will cease to be a permanent resident under subsection 24(1) of the Act.

(4) An immigration officer may, pursuant to subsection (2), issue a returning resident permit

(a) valid for a period not exceeding twelve months; or

(b) with the approval of a senior immigration officer, valid for a period not exceeding twenty-four months.

### **Certificates of Departure**

27. (1) Subject to subsection (2), a certificate of departure referred to in section 32.02 of the Act that verifies that a person in respect of whom a departure order has been issued has left Canada may be issued not later than 30 days

(a) where the departure order is stayed, after the day on which the stay is no longer in effect;

(b) where the Minister has declared a moratorium in respect of the removal of all nationals of the country of which the person is a national, after the end of the moratorium; or

(c) in any other case, after the day on which the departure order becomes effective.

(2) In the case of a person who claims to be a Convention refugee but who has been determined by the Refugee Division not to be a Convention refugee, a certificate of departure referred to in subsection (1) may be issued not later than 30 days

(a) after the day on which the person has been notified that an immigration officer has determined that the person is not a member of the post-determination refugee claimants in Canada class; or

(b) where the person is a member of the post-determination refugee claimants in Canada class but has been refused landing, after the day on which the person has been notified that the immigration officer has determined that the immigrant shall not be granted landing.

27.1 A conditional removal order or a copy thereof shall be considered to have been served on a person who claims to be a Convention refugee if it is sent by ordinary mail to the person at that person's last known address.

28. [Revoked SOR/93-44.]

- 29. [Revoked SOR/93-44.]
- 30. [Revoked SOR/93-44.]
- 31. [Revoked SOR/93-44.]
- 32. [Revoked SOR/93-44.]
- 33. [Revoked SOR/93-44.]
- 34. [Revoked SOR/93-44.]
- 35. [Revoked SOR/93-44.]
- 35.1 [Revoked SOR/93-44.]
- 36. [Revoked SOR/93-44.]
- 37. [Revoked SOR/93-44.]
- 38. [Revoked SOR/93-44.]
- 39. [Revoked SOR/93-44.]
- 39.1 [Revoked SOR/93-44.]
- 39.2 [Revoked SOR/93-44.]
- 39.3 [Revoked SOR/93-44.]
- 39.4 [Revoked SOR/93-44.]
- 39.5 [Revoked SOR/93-44.]

#### Applications for Landing

40. An application for landing pursuant to subsection 46.04(1) of the Act, as amended by S.C. 1988, c. 35, section 14, shall be filed with an immigration officer, within 60 days after the applicant has been finally determined to be a Convention refugee.

#### Refusal of Sponsored Applications

41. (1) Where an immigration officer refuses to approve an application for landing that has been made by a member of the family class and has been sponsored, the immigration officer shall,

- (a) where the refusal to approve the application is made on the grounds referred to in paragraph 77(1)(a) of the Act, provide to the sponsor, or
- (b) where the refusal to approve the application is made on the grounds referred to in paragraph 77(1)(b) of the Act, provide to the member of the family class



a summary of the information on which his reason for refusal is based.

(1.1) Notwithstanding subsection (1), where the refusal to approve an application is made pursuant to paragraph 77(1)(b) of the Act on the grounds that the member of the family class is a person described in any of paragraphs 19(1)(d) to (g) of the Act, the immigration officer shall inform the member of the family class of those grounds only.

(2) Where an application for landing made by a member of the family class has been refused pursuant to subsection 77(1) of the Act, an immigration officer shall inform the sponsor in writing that, if he is a Canadian citizen or permanent resident, he has a right of appeal to the Appeal Division pursuant to subsection 77(3) of the Act.

### Removal Costs

42. The costs and expenses incurred by Her Majesty to be included in determining removal costs that may be assessed against a transportation company are the following:

- (a) expenses incurred within or outside Canada with respect to the transportation of the person who is removed from Canada;
- (b) accommodation costs incurred during the removal of the person from Canada; and
- (c) accommodation and travel expenses incurred by an escort provided for the person who is removed from Canada.

42.1 The prescribed costs for the purposes of section 55.1 of the Act for a person who has been removed to a destination set out in column I of an item of Schedule VIII are the costs set out in column II of that item.

### Administration Fees Preliminary Assessments

42.2 (1) Subject to subsection (2), a preliminary assessment of an administration fee may be made against a transportation company, pursuant to section 91.1 of the Act, in respect of any member of the following classes of persons:

- (a) persons who are members of an inadmissible class described in paragraph 19(2)(d) of the Act because the persons were presented to an immigration officer without a valid and subsisting visa, passport or travel document required by the Act or these Regulations;
- (b) persons that the transportation company may not carry to Canada, pursuant to subsection 50(2);
- (c) persons who are exempt, pursuant to subsection 14(4), from the require-

ment to possess a valid and subsisting passport or travel document but who fail to produce sufficient documentary evidence pursuant to subsection 14(6);  
(d) persons who have eluded examination under the Act; and  
(e) persons who remain in Canada after they have ceased to be visitors by reason of paragraph 26(1)(c.1) of the Act.

(2) The classes of persons referred to in subsection (1) shall not include persons who are

- (a) granted entry pursuant to subsection 19(3) or 23(2) of the Act or allowed by a senior immigration officer to come into Canada pursuant to section 22 of the Act;
- (b) issued a permit by the Minister pursuant to paragraph 37(1)(a) of the Act before the opening of an inquiry;
- (c) allowed to leave Canada forthwith pursuant to paragraph 20(1)(b), subsection 23(4) or paragraph 23(4.2)(b) of the Act and who leave Canada;  
or
- (d) the subject of an exclusion order made by a senior immigration officer pursuant to subsection 23(4) of the Act and who leave Canada.

42.3 (1) Subject to subsections (2) and (3), where the Minister makes a preliminary assessment of an administration fee against a transportation company in respect of persons set out in column I of an item of Schedule IX, the Minister shall assess against the transportation company the administration fee set out in column II of that item.

(2) Where a memorandum of understanding between the transportation company and the Minister, in accordance with subsection (4), is in effect for the purpose of improving the performance of the transportation company with respect to its duty under section 89.1 of the Act and the transportation company demonstrates that it is complying with the memorandum of understanding, the Minister shall assess against the transportation company, in respect of persons set out in column I of an item of Schedule IX, the administration fee set out in column III of that item.

(3) Where a memorandum of understanding referred to in subsection (2) contains contravention rate performance standards for the purpose of reducing the administration fee referred to in subsection (1) and the transportation company demonstrates that it is complying with the provisions referred to in subsection (4), the Minister shall assess against the transportation company, in respect of persons set out in column I of an item of Schedule IX, the portion of the administration fee specified in one or more of paragraphs (a) to (c), as set out in the memorandum of understanding:

- (a) where the transportation company is the subject of a number of assessments under subsection 91.1(1) of the Act that is equal to or less than the number fixed in the memorandum for the period specified in the

memorandum for the purpose of reducing the administration fee by one half, the Minister shall assess against the transportation company the administration fee set out in column IV of that item, in respect of each assessment of an administration fee that is made in the immediately following period specified in the memorandum;

(b) where the transportation company is the subject of a number of assessments under subsection 91.1(1) of the Act that is equal to or less than the number fixed in the memorandum for the period specified in the memorandum for the purpose of reducing the administration fee by three-quarters, the Minister shall assess against the transportation company the administration fee set out in column V of that item, in respect of each assessment of an administration fee that is made in the immediately following period specified in the memorandum; and

(c) where the transportation company is the subject of a number of assessments under subsection 91.1(1) of the Act that is equal to or less than the number fixed in the memorandum for the period specified in the memorandum, for the purpose of reducing the administration fee to zero, the Minister shall assess against the transportation company the administration fee set out in column VI of that item, in respect of each assessment of an administration fee that is made in the immediately following period specified in the memorandum.

(4) A memorandum of understanding referred to in subsection (2) shall include provisions respecting

- (a) document screening;
  - (b) the use of technological aids;
  - (c) the training of personnel in document screening;
  - (d) fraud prevention;
  - (e) gate checks;
  - (f) information exchange;
  - (g) performance standards in respect of document screening, contravention rates and interdiction rates;
  - (h) compliance monitoring of the provisions of the memorandum of understanding;
  - (i) hiring practices related to members of a crew;
  - (j) the holding of documents under section 50.1;
  - (k) the provision of advance passenger manifest or crew list information;
- and
- (l) stowaways.

(5) Subsections (2) and (3) do not apply in respect of an administration fee assessed in respect of persons referred to in paragraph 42.2(1)(e).



### Notices

#### 42.4 A senior immigration officer shall

- (a) where a removal order or conditional removal order is made against a person, so inform the transportation company that is or may be required, pursuant to section 85 of the Act, to convey the person or cause the person to be conveyed from Canada; and
- (b) where a removal order is made against a person or where a conditional removal order made against a person becomes effective, serve on the transportation company a notice requiring it, pursuant to section 85 of the Act, to convey the person or cause the person to be conveyed from Canada and specifying whether the transportation company is liable to pay removal costs pursuant to section 86 of the Act.

42.5 (1) A notice of a preliminary assessment referred to in section 91.1 of the Act shall be served personally or by registered mail on a representative of the transportation company.

(2) The person who serves a notice of a preliminary assessment shall complete and sign an affidavit of service or a certificate of service that certifies that the notice was served on the transportation company.

(3) Service of a notice of a preliminary assessment by registered mail shall be considered to have been served on the seventh day after the day on which the notice was mailed.

### Photographs and Fingerprints

43. All immigrants and visitors shall provide with their applications for a visa the number of clearly identifiable photographs of themselves that may reasonably be required by an immigration officer.

44. An immigration officer may require the following persons to be photographed and fingerprinted:

- (a) persons who seek admission;
- (b) persons who make an application pursuant to subsection 9(1), section 10, subsection 10.2(1) or section 16 of the Act;
- (c) persons who are arrested pursuant to section 103 of the Act;
- (d) persons against whom a removal order or conditional removal order has been made; or
- (e) persons who claim to be Convention refugees pursuant to subsection 44(1) of the Act.

### Loans

**45. (1) The Minister may make transportation loans to immigrants and to persons who are**

- (a) Canadian citizens or permanent residents residing in Canada who have made an application to the Minister for financial assistance to obtain, for dependants who are seeking landing, transportation to Canada and transportation from their port of arrival to their place of destination in Canada;**
- (b) seeking landing and are in possession of a permit; or**
- (c) Convention refugees or members of a class of persons designated pursuant to paragraph 114(1)(d) of the Act who are in Canada, are seeking landing and have made an application to the Minister for financial assistance to obtain, for dependants who are seeking landing, transportation to Canada and transportation from their port of arrival to their place of destination in Canada.**

**(2) The Minister may make assistance loans to permanent residents, Convention refugees and persons who are lawfully in Canada and seeking landing.**

**(3) The Minister may make an admissibility loan**

**(a) to immigrants who are**

- (i) Convention refugees seeking resettlement, or**
- (ii) members of a class of persons designated pursuant to paragraph 114(1)(d) of the Act; and**

**(b) to persons who are**

- (i) permanent residents residing in Canada who are Convention refugees or were, immediately prior to coming to Canada, members of a class of persons designated pursuant to paragraph 114(1)(d) of the Act and who have made an application to the Minister for financial assistance to establish that their dependants who are seeking landing may be granted admission, or**
- (ii) Convention refugees or were, immediately prior to coming to Canada, members of a class of persons designated pursuant to paragraph 114(1)(d) of the Act who are in Canada, are seeking landing and have made an application to the Minister for financial assistance to establish that their dependants who are seeking landing may be granted admission.**

**(4) The maximum amount of outstanding advances to the Minister under subsection 119(1) of the Act is one hundred and ten million dollars.**

**46. (1) Where a loan is made to a person pursuant to section 45, it shall, subject to section 47, be repaid in full by consecutive monthly instalments commencing**

**(a) in the case of a transportation loan or an admissibility loan, on the first**

day of the month following the month in which the person for whose benefit the loan was made arrives in Canada; and

(b) in the case of an assistance loan, on the first day of the month following the month in which the proceeds of the loan are paid to or for the benefit of that person.

(2) A loan made to a person pursuant to section 45 is, subject to section 47, repayable

(a) where the amount of the loan is \$750 or less, during a period of 12 months,

(b) where the amount of the loan is more than \$750 but not more than \$1500, during a period of 24 months,

(c) where the amount of the loan is more than \$1500 but not more than \$2250, during a period of 36 months,

(d) where the amount of the loan is more than \$2250 but not more than \$3000, during a period of 48 months, or

(e) where the amount of the loan is more than \$3000, during a period of 60 months,

commencing on the day on which the first monthly instalment is payable.

(3) Where the employer of a person to whom a loan is made pursuant to section 45 is willing to institute repayment of the loan by means of a payroll deduction scheme, the Minister may require repayment by such means.

47. (1) Where a loan is made to a person pursuant to section 45 and that person satisfies an immigration officer that by reason of his income, assets and liabilities he cannot reasonably repay the loan in accordance with the requirements of section 46, the immigration officer may, subject to subsection (2), defer commencement of repayment of the loan, defer payments, vary the amount of payments or extend the repayment period.

(2) An immigration officer shall not grant a deferral, variation or extension under subsection (1) the effect of which would be to extend a repayment period referred to in subsection 46(2) beyond

(a) an additional 24 months in the case of a loan made to a Convention refugee or a member of a class of persons designated pursuant to paragraph 114(1)(d) of the Act; or

(b) an additional six months in the case of a loan made to any other person.

48. (1) Where a loan is made pursuant to section 45 to a person other than a Convention refugee or a member of a class of persons designated pursuant to paragraph 114(1)(d) of the Act, the loan shall, subject to subsection (2), bear interest at a rate equal to the rate that is established by the Minister of Finance for loans made by that Minister to Crown corporations and is in



effect on the first day of January in the year in which the loan was approved, computed from the first day of the month following the day

- (a) on which the person for whose benefit the loan was made arrives in Canada, in the case of a transportation loan or an admissibility loan; or
- (b) on which the proceeds of the loan were advanced, in the case of an assistance loan.

(2) Where a loan is made pursuant to section 45 to any person who has previously obtained a loan under that section that has not been repaid, the loan shall bear interest at a rate equal to the rate of interest payable on the loan that was previously obtained.

### Return or other Disposition of Seized Documents

49. (1) Subject to subsection (2), where an immigration officer has seized and holds any travel or other document pursuant to paragraph 110(2)(b) of the Act, the immigration officer may return the document to the person from whom it was seized

- (a) immediately, where the person is granted admission or allowed to come into Canada; or
- (b) at the time the person is removed from Canada or allowed to leave Canada.

(2) Where an immigration officer has seized and holds any travel or other document pursuant to paragraph 110(2)(b) or (c) of the Act, the immigration officer

- (a) may retain or destroy the document if the immigration officer has reasonable grounds to believe that the document is fraudulent or was improperly issued, obtained or used and the rightful holder or issuing authority was a party to the fraud or improper issuance, obtention or use;
- (b) may retain or destroy the document if the immigration officer has reasonable grounds to believe that the document has been fraudulently or improperly obtained or used or may be fraudulently or improperly used; or
- (c) in any other case, may

- (i) return the document to the rightful holder or to the issuing authority if the rightful holder is known, or
- (ii) retain or destroy the document or return the document to the issuing authority if the rightful holder is not known.

**Subsection (2)**

*Gassmann v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 149, 36 F.T.R. 105 (Fed. T.D.).

Mandamus will compel the Minister to return a passport which the department turned over to a foreign government (the Federal Republic of Germany). The applicant entered Canada as a visitor and in the course of applying for an extension his passport was taken by the Immigration Authorities. The passport was not returned to the applicant but an interview was scheduled and ultimately the applicant was advised that the German government had cancelled or confiscated his passport. The Minister justified what was done under section 110(2)(c) of the Immigration Act. There was no evidence to suggest that the passport had been improperly obtained or used, or that action was necessary to prevent its fraudulent or improper use. Further, the Minister's officials did not tell the applicant what they had done with his passport, namely, returned it to the government of the Federal Republic of Germany and did not allow him to make representations to them prior to taking the action that they contemplated. Accordingly, an order was issued directing the Minister to return the passport to the applicant.

**Obligations of Transportation Companies****50. (1) [Revoked SOR/89-38.]**

(2) When the Minister informs a transportation company that a named person, who is not a Canadian citizen or a permanent resident, is, in his opinion, a member of any of the classes described in subsection 19(1) of the Act, the transportation company shall not carry that person to Canada.

**50.1 (1)** A transportation company bringing persons into Canada may hold the visa, passport or other travel document of any passenger carried or to be carried by it in order to ensure that the visa, passport or travel document is available for examination by an immigration officer at the port of entry if the transportation company issues to the passenger a receipt therefore in a form established by the Minister.

(2) On the arrival in Canada of a passenger whose visa, passport or travel document is held by a transportation company, the transportation company shall, at the time it presents the passenger for examination in accordance with subsection 89(1) of the Act, give the visa, passport or travel document and a copy of the receipt issued therefor to an immigration officer at the port of entry.

(3) Where evidence is necessary to establish the identity or itinerary for travel to Canada of a passenger brought by a transportation company to Canada, the transportation company shall, at the request of an immigration officer, furnish to the immigration officer at the port of entry not later than 72 hours after the arrival of the passenger, unless an extension of no more than seven

days is granted by an immigration officer, any of the following documents as requested, where the transportation company has access to the documents or information to be specified in the documents:

- (a) a copy of the passenger's ticket voucher;
- (b) a document specifying the passenger's travel itinerary, including the passenger's country of embarkation and dates of travel; and
- (c) a document specifying the type of travel or identity document carried by the passenger, the country of issue and number of the document and the name of the person to whom the document was issued.

51. Where a person who is held in custody under the Act by a transportation company or by a member of a crew escapes from custody, the transportation company or member of the crew shall notify an immigration officer forthwith of the escape and, where requested to do so by an immigration officer, shall provide forthwith a written report that sets out the details of the escape.

52. Where a person has stowed away in or on a vehicle coming to Canada,

- (a) the transportation company shall notify an immigration officer of the presence of the stowaway as soon as the vehicle enters Canadian territory and, where requested to do so by an immigration officer, shall provide forthwith a written report that sets out the details of the case; and
- (b) the master shall hold that stowaway in custody on the vehicle until that stowaway can be presented to an immigration officer for examination.

53. (1) Where a ship of foreign registry, other than a pleasure yacht as defined in section 2 of the *Canada Shipping Act*, arrives in Canada, the master shall provide an immigration officer forthwith with an accurate and complete list of the members of the crew.

(2) Before the departure of a ship referred to in subsection (1) from its final port of call in Canada, the master shall provide an immigration officer with copies of the list of the members of the crew that were endorsed by an immigration officer at the port of entry, which copies of the list shall include all changes to the list that occurred while the ship was in Canada.

(3) The master of a ship of Canadian registry, other than a pleasure yacht as defined in section 2 of the *Canada Shipping Act*, shall, only where requested to do so by an immigration officer, provide an immigration officer forthwith with an accurate and complete list of the members of the crew.

(4) The master of a ship referred to in subsection (3) shall, on each arrival of the ship in Canada, notify an immigration officer of the presence of any members of the crew who are not Canadian citizens or permanent residents.

54. (1) The master of a vehicle shall notify an immigration officer forthwith and, where requested by an immigration officer to do so, shall provide forthwith



a written report that sets out the details, where any member of the crew, other than a Canadian citizen or permanent resident,

- (a) deserts;
- (b) is hospitalized;
- (c) fails to rejoin the vehicle at the time fixed by the master when the member of the crew left the vehicle; or
- (d) has ceased for any other reason to perform the person's duties as a member of the crew.

(2) The master of a vehicle shall notify an immigration officer forthwith and, where requested by an immigration officer to do so, shall provide forthwith a written report that sets out the details, where any person is granted entry as or to become a member of the crew but fails to join the vehicle at the time expected by the master.

### Offences Relating to Obligations of Transportation Companies

54.1 Contravention of any of the following provisions, designated for the purposes of subsection 97.1(1) of the Act, constitutes an offence:

- (a) carrying a person, in contravention of subsection 50(2);
- (b) failure to give a visa, passport or travel document to an immigration officer, in contravention of subsection 50.1(2);
- (c) failure to furnish documents to an immigration officer, in contravention of subsection 50.1(3);
- (d) failure to notify an immigration officer of an escape, in contravention of section 51;
- (e) failure to notify an immigration officer of the presence of a stowaway, in contravention of paragraph 52(a);
- (f) failure to hold a stowaway in custody, in contravention of paragraph 52(b);
- (g) failure to provide an accurate and complete list of members of the crew, in contravention of subsection 53(1), (2) or (3);
- (h) failure to notify an immigration officer of the presence of any members of the crew who are not Canadian citizens or permanent residents, in contravention of subsection 53(4);
- (i) failure to notify an immigration officer that a member of the crew has deserted, in contravention of paragraph 54(1)(a);
- (j) failure to notify an immigration officer that a member of the crew is hospitalized or has ceased to perform the person's duties as a member of a crew, in contravention of paragraph 54(1)(b) or (d);
- (k) failure to notify an immigration officer that a member of the crew has failed to rejoin the vehicle, in contravention of paragraph 54(1)(c); and
- (l) failure to notify an immigration officer that a person granted entry into

Canada as or to become a member of the crew has failed to join the vehicle, in contravention of subsection 54(2).

**54.2** Contravention of section 51, paragraph 52(a), 54(1)(a), (b), (c) or (d) or subsection 54(2) for failure to provide a written report, designated for the purposes of subsection 97.1(3) of the Act, constitutes an offence.

#### **Property of Deceased Persons**

**55.** Where a person, other than a Canadian citizen or permanent resident, dies in Canada at an immigrant station or at some other place while he is under the control and supervision of an immigration officer, a senior immigration officer shall

(a) prepare a written report accounting for all moneys and personal property belonging to the person at that station or place,

and, unless otherwise directed by the Minister,

(b) where a relative of the person is known by the senior immigration officer to be in Canada, deliver the moneys and personal property and a copy of the written report referred to in paragraph (a) to the relative and obtain a receipt therefor, or

(c) in any case not referred to in paragraph (b), deliver the moneys and personal property and a copy of the written report referred to in paragraph (a) to the consular authorities in Canada of the country of which that person was a citizen or resident and obtain a receipt therefor.

#### **Payments of Prescribed Nature**

**56.** For the purposes of subsection 118(1) of the Act, payments that result from a breach of an undertaking and that are made directly or indirectly to an immigrant under an item described in column I of Schedule VI are payments that may be recovered from the person or organization that gave the undertaking as a debt due to Her Majesty in right of Canada or in right of any province to which the undertaking is assigned.

**SCHEDULE I**  
(ss. 3, 7, 8 and 11)

Column I	Column II	Column III
Factors	Criteria	Max. Units
1. Education	<p>(1) Subject to subsections (2) to (4), units of assessment shall be awarded as follows:</p> <p>(a) where a diploma from a secondary school has not been completed, zero units;</p> <p>(b) where a diploma from a secondary school has been completed, the greater number of the following applicable units:</p> <p>(i) in the case of a diploma that does not lead to entrance to university in the country of study and does not include trade or occupational certification in the country of study, five units,</p> <p>(ii) in the case of a diploma that may lead to entrance to university in the country of study, ten units, and</p> <p>(iii) in the case of a diploma that includes trade or occupational certification in the country of study, ten units;</p> <p>(c) where a diploma or apprenticeship certificate that requires at least one year of full-time classroom study has been completed at a college, trade school or other post-secondary institution, the greater number of the following applicable units:</p> <p>(i) in the case of a diploma or apprenticeship certificate program that requires completion of a secondary school diploma referred to in subparagraph (b)(i) or (ii) as a condition of admission, ten units, and</p> <p>(ii) in the case of a diploma or apprenticeship certificate program that requires completion of a secondary school diploma referred to in subparagraph (b)(ii) as a condition of admission, thirteen units;</p> <p>(d) where a first-level university degree that requires at least three years of full-time study has been completed, fifteen units; and</p> <p>(e) where a second- or third- level university degree has been completed, sixteen units.</p>	16



Column I	Column II	Column III
Factors	Criteria	Max. Units
	<p>(2) Units of assessment shall only be awarded for a diploma, degree or apprenticeship certificate referred to in any of paragraphs (1)(b) to (e) that has been completed at an institution other than a designated institution and in a field of study other than a designated field of study.</p> <p>(3) Only a single diploma, degree or apprenticeship certificate shall be taken into consideration when determining the units of assessment to be awarded in accordance with the applicable paragraph of subsection (1).</p> <p>(4) The units of assessment set out in paragraphs (1)(b) to (e) shall not be awarded cumulatively, and the number of units of assessment set out in the applicable paragraph that awards the greatest number of units shall be awarded.</p>	
2. Specific Vocational Preparation	<p>To be measured by the amount of formal professional, vocational, apprenticeship, in-plant, or on-the-job training specified in the Canadian Classification and Dictionary of Occupations, printed under the authority of the Minister, as necessary to acquire the information, techniques and skills required for average performance in the occupation in which the applicant is assessed under item 4. Units of assessment shall be awarded as follows:</p> <p>(a) when the amount of training required is up to and including thirty days, one unit;</p> <p>(b) when the amount of training required is more than thirty days up to and including three months, three units;</p> <p>(c) when the amount of training required is more than three months up to and including six months, five units;</p> <p>(d) when the amount of training required is more than six months up to and including one year, seven units;</p> <p>(e) when the amount of training required is more than one year up to and including two years, eleven units;</p>	16

Column I	Column II	Column III
Factors	Criteria	Max. Units
	<p>(f) when the amount of training required is more than two years up to and including four years, fifteen units;</p> <p>(g) when the amount of training required is more than four years up to and including ten years, eighteen units; and</p> <p>(h) when the amount of training required is more than ten years, eighteen units.</p>	
3. Experience	<p>Units of assessment shall be awarded for experience in the occupation in which the applicant is assessed under item 4 or, in the case of an entrepreneur, for experience in the occupation that the entrepreneur is qualified for and is prepared to follow in Canada, as follows:</p> <p>(a) when the Specific Vocational Preparation time needed is up to and including three months, two units for the first year of experience;</p> <p>(b) when the Specific Vocational Preparation time needed is more than three months up to and including twelve months, two units for each year of experience not exceeding two years;</p> <p>(c) when the Specific Vocational Preparation time needed is more than one year up to and including four years, two units for each year of experience not exceeding three years; and</p> <p>(d) when the Specific Vocational Preparation time needed is more than four years, two units for each year of experience.</p>	8
4. Occupational Demand	<p>Units of assessment shall be awarded on the basis of employment opportunities available in Canada in the occupation that the applicant is qualified for and is prepared to follow in Canada, such opportunities being determined by taking into account labour market demand on both an area and national basis.</p>	10
5. Arranged Employment or Designated Occupation	<p>Ten units shall be awarded if, in the opinion of the visa officer,</p> <p>(a) the person has arranged employment in Canada that, based on the information provided by the National Employment Service, offers reasonable prospects of continuity and wages</p>	10

Column I	Column II	Column III
Factors	Criteria	Max. Units
	<p>and working conditions sufficient to attract and retain in employment Canadian citizens or permanent residents,</p> <p>(b) based on information provided by the National Employment Service, employment of the person in Canada will not adversely affect employment opportunities for Canadian citizens or permanent residents in Canada, and</p> <p>(c) the person will likely be able to meet all federal, provincial and other applicable licensing and regulatory requirements related to the employment, or</p> <p>if, in the opinion of the visa officer,</p> <p>(d) the person is qualified for and is prepared to engage in employment in a designated occupation,</p> <p>(e) based on information provided by the National Employment Service, employment in the designated occupation offers reasonable prospects of continuity and wages and working conditions sufficient to attract and retain in employment Canadian citizens or permanent residents, and</p> <p>(f) the person will likely be able to meet all federal, provincial and other applicable licensing or regulatory requirements related to employment in the designated occupation.</p>	
6. Demographic Factor	Units of assessment shall be awarded as determined by the Minister after consultation with the provinces and such other persons, organizations and institutions as he deems appropriate concerning regional demographic needs, labour market considerations and the ability of the national infrastructure to accommodate population growth.	10
7. Age	Ten units of assessment shall be awarded with respect to a person who is at least 21 years of age and not more than 44 years of age. Where a person is more than 44 years of age, two units shall be subtracted from the maximum of ten units for each year by which the person exceeds 44 years of age.	10



Column I	Column II	Column III
Factors	Criteria	Max. Units
8. Knowledge of English and French Languages	<p>(1) For the first official language, whether English or French, as stated by the person, credits shall be awarded according to the level of proficiency in each of the following abilities, namely, speaking, reading and writing, as follows:</p> <p>(a) for an ability to speak, read or write fluently three credits shall be awarded for each ability;</p> <p>(b) for an ability to speak, read or write well but not fluently, two credits shall be awarded for each ability; and</p> <p>(c) for an ability to speak, read or write with difficulty, no credits shall be awarded for that ability.</p> <p>(2) For the second official language, whether English or French, as stated by the person, credits shall be awarded according to the level of proficiency in each of the following abilities, namely, speaking, reading and writing, as follows:</p> <p>(a) for an ability to speak, read or write fluently, two credits shall be awarded for each ability;</p> <p>(b) for an ability to speak, read or write well but not fluently, one credit shall be awarded for each ability; and</p> <p>(c) for an ability to speak, read or write with difficulty, no credits shall be awarded for that ability.</p> <p>(3) Units of assessment shall be awarded on the basis of the total number of credits awarded under subsections (1) and (2) as follows:</p> <p>(a) for zero credits or one credit, zero units;</p> <p>(b) for two to five credits, two units; and</p> <p>(c) for six or more credits, one unit for each credit.</p>	15
9. Personal Suitability	Units of assessment shall be awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities.	10

*Factor 9*

*Lam v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 275, 49 F.T.R. 200 (T.D.).

The applicant applied for permanent residence as a self-employed person. The visa officer rejected the application without ever affording the applicant an interview. The visa officer determined that the applicant could not have met the minimum requirement of 70 units of assessment to qualify as a self-employed person even if he had been accorded the maximum 10 units of assessment for personal suitability after an interview. Because the officer determined that the applicant did not meet the definition of a self-employed person he did not give the applicant the 30 units of assessment for self-employment described in Regulation 8(4).

Schedule 1 of the Regulations in Factor 9 describes under the criteria for personal suitability the units of assessment awarded on the basis of an interview with the person to reflect the personal suitability of the person and his dependents to become successfully established in Canada. Schedule 1, Factor 9, was taken to mean that the officer doing the assessment must award up to 10 units depending on his finding as to personal suitability. Where the maximum 10 units are awarded the interviewing officer must have been satisfied that the prospective immigrant has the personal suitability to become successfully established in Canada.

By not having granted the applicant an interview the officer was not in a position to determine whether he would have allowed the 30 units assessment in section 8(4) of the Regulations. Further, section 11(3) of the Regulations permits a visa officer to issue a visa even if the applicant is not awarded the necessary units of assessment. If the applicant has all the qualities mentioned in Factor 9 of Schedule 1, a visa officer cannot form a valid opinion under section 11(3) without an interview. The visa officer has no discretion not to grant the interview mentioned in Factor 9. It is incumbent upon a visa officer to follow the procedure set out in statute. The officer has no discretion in deciding whether or not to grant an interview pursuant to Factor 9 under column 1 of Schedule 1 of the Regulations. The decision of the officer in this case was quashed. The Minister was directed to reconsider the applicant's application and another visa officer was to effect this reconsideration.

*Editor's Note:* See, however, section 11.1 of the Immigration Regulations.

**SCHEDULE II**

(s. 13)

1. Citizens of Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Botswana, Brunei, Costa Rica, Cyprus, Denmark, Dominica, Finland, France, Federal Republic of Germany, Greece, Grenada, Iceland, Ireland, Italy, Japan, Kiribati, Liechtenstein, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Monaco, Namibia, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Republic of Korea, St. Kitts and Nevis, St. Lucia, St. Vincent, San Marino, Saudi Arabia, Singapore, Solomon Islands, Spain, Swaziland, Sweden, Switzerland, Tuvalu, Vanuatu, Venezuela, Western Samoa and Zimbabwe.

2. British Citizens and British Overseas Citizens who are re-admissible to the United Kingdom.
3. Citizens of British dependent territories who derive their citizenship through birth, descent, registration or naturalization in one of the British dependent territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, St. Helena or the Turks and Caicos Islands.
4. Persons holding passports or travel documents issued by the Holy See.
5. Nationals of the United States, and persons lawfully admitted to the United States for permanent residence.
6. Persons who seek entry to become members of a crew of a vehicle that is in Canada and members of a crew who seek entry, other than citizens of a foreign country with which the Government of Canada has entered into an agreement whereby such persons or members of a crew are required to obtain visas.
7. Persons who are in transit through Canada on a flight that stops in Canada solely for the purpose of refuelling and who
  - (a) are in possession of a valid visa to enter the United States on a flight bound for the United States; or
  - (b) have been lawfully admitted to the United States and are on a flight originating in the United States.
8. Members of the armed forces of a country that is a designated state for the purposes of the Visiting Forces Act who are seeking entry in order to carry out their official duties, other than persons who have been designated as civilian components of that force.
9. Persons coming to Canada from the United States for an interview with a United States consular officer concerning a United States immigrant visa where they are in possession of evidence satisfactory to an immigration officer that they will be granted re-entry to the United States.
10. [Revoked SOR/83-902.]
11. Persons in possession of valid and subsisting student authorizations or employment authorizations seeking to return as visitors to Canada from the United States or St. Pierre and Miquelon where the authorizations were issued prior to the departure of those persons from Canada.
12. Persons holding passports containing a valid and subsisting "Diplomatic Acceptance", "Consular Acceptance" or "Official Acceptance" stamp issued by the Chief of Protocol for the Department of External Affairs on behalf of the Government of Canada.
13. Persons visiting Canada who, during that visit, also visit the United States or St. Pierre and Miquelon and return to Canada therefrom as visitors within the period authorized on their initial entry or any extension thereto.
14. Persons holding valid and subsisting diplomatic passports issued to them by a country



with which Canada has entered into an agreement whereby each country is to exempt holders of such passports from the requirement to obtain visas.

15. Persons holding valid and subsisting official, special or service passports issued to them by a country with which Canada has entered into an agreement whereby each country is to exempt from the requirement to obtain visas those holders of such passports who are seeking entry in order to carry out their official duties.
16. Citizens of Israel who are in possession of valid and subsisting national Israeli passports.

### SCHEDULE III

(Subsection 17(2) and paragraph 23(3)(m))

1. [Revoked SOR/86-865.]
2. General Welding School, 61 Jarvis Street, Toronto, Ontario
3. [Revoked SOR/83-540.]
4. Radvis University, Charlottetown, Prince Edward Island
5. The Way College of Biblical Research, London, Ontario.

### SCHEDULE IV

(s. 6)

1. The factor referred to in subsection 6(2) is the Low Income Cutoff figures published by Statistics Canada under the authority of the *Statistics Act*.

### SCHEDULE V

[Revoked SOR/93-44.]

### SCHEDULE VI

(s. 56)

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#### Column 1

#### Payments of Prescribed Nature

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1. as assistance under the *Adjustment Assistance Program*
2. as income assistance or social services under subsection 2(1) of the *Guaranteed Available Income For Need Act* (R.S.B.C. 1979, ch. 158)
3. as "assistance", "municipal assistance" or "social allowance" under the *Social Allowances Act* (R.S.M. 1970, ch. S-160)
4. as "assistance" under the *Social Welfare Act* (R.S.N.B. 1973, ch.6-11)
5. as social assistance under the *Social Assistance Act* (R.S.N. 1970, ch. 353)
6. (i) as assistance under the *Social Assistance Act* (S.N.S. 1970, ch.16), or  
(ii) as benefits under the *Family Benefits Act* (S.N.S. 1977, ch.8).

- 
7. as "assistance" under the Welfare Assistance Act (R.S.P.E.I. 1974, ch. W-4)
8. as "assistance" under the Saskatchewan Assistance Act (R.S.S. 1978, ch. S-8)
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## SCHEDULE VII

(Section 14)

1. (1) A travel document issued by the International Committee of the Red Cross, Geneva, Switzerland, to enable and facilitate emigration.

(2) [Revoked SOR/90-605.]

(3) An exit visa issued by the Government of the Union of Soviet Socialist Republics to former citizens of that country compelled to relinquish their nationality in order to emigrate therefrom.

2. (1) A laissez-passer issued by the United Nations.

(2) [Revoked SOR/90-605.]

(3) A document issued by the Organization of American States entitled "Official Travel Document".

(4) A passport issued by the Government of the United Kingdom to a British Overseas Citizen.

3. (1) Any passport, identity or travel document purporting to be issued by Bophuthatswana, Ciskei, Transkei, or Venda.

(2) Any passport, identity or travel document purporting to be issued by the All Palestine Government.

(3) Any passport issued by the Government of the United Kingdom entitled 'British Visitor's Passport'.

## SCHEDULE VIII

(s. 42.1)

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	Column I	Column II
Item	Destinations	Costs
1.	United States or St. Pierre and Miquelon	\$ 750
2.	Any other destination	1,500

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## SCHEDULE IX

(s. 42.3)

Item	Column I Persons	Administration Fees				
		Column II	Column III	Column IV	Column V	Column VI
1.	Members of a crew who have deserted	\$3,200	N/A	N/A	N/A	N/A
2.	Any other persons	3,200	2,400	1,600	800	0

## SCHEDULE X

(Paragraph 6.12(4)(a))

## CONTENTS OF AN OFFERING MEMORANDUM

1. An offering memorandum shall include the following information, statements and documents:

(a) a front cover page that

(i) contains the title of the offering memorandum and the following statements, in boldface type at the top of the page, namely,

**“No securities commission or similar regulatory authority has passed on the merits of the securities offered in this offering memorandum nor has it reviewed this offering memorandum, and any representation to the contrary is an offence.**

**Neither the Government of Canada nor the Government of the Province of *(insert the name of the province of investment)* has passed on the merits of these securities.**

**There are restrictions on the sale of these securities. These are speculative securities. See “Risk Factors”.”,**

(ii) contains the following statement, where applicable, in boldface type, namely,

**“There is no market through which these securities may be sold. It may be difficult or even impossible for an investor to sell them.”,**

(iii) states the name, head office address, telephone number and facsimile number of the eligible business or fund and, where applicable, the fund manager,



- (iv) states the amount of the minimum investment required from an investor,
- (v) describes the type of securities offered,
- (vi) provides a table in the following form:

	Price to investor	Commission	Net proceeds to*
Per minimum investment unit			
Minimum offering			
Maximum offering			

\* Insert the name of the eligible business or fund.

- (vii) states the estimated costs of the offering,
  - (viii) states the name, address, telephone number and facsimile number of the representative of the eligible business or fund, and, where applicable, of the fund manager, who may be contacted respecting the offering, and
  - (ix) states the date of the offering memorandum and the date on which the offering expires;
- (b) a summary of information in the offering memorandum that is likely to influence an investor's decision to purchase the securities;
- (c) a summary of the immigration aspects of the offering memorandum, including the requirements for the granting of landing as an investor;
- (d) information respecting the eligible business or fund, and, where applicable, the fund manager, including
- (i) the full name of the eligible business or fund and the fund manager,
  - (ii) the location of the registered office of the eligible business or fund and the fund manager,
  - (iii) the date and place of incorporation or registration of the eligible business or fund and the fund manager, and
  - (iv) a description of the principal business activities of the eligible business or fund and the fund manager;
- (e) information respecting each director and officer of the eligible business or fund and, where applicable, of the fund manager, including
- (i) the name and municipality of residence of the director or officer,
  - (ii) the employers of and the positions held by the director or officer during the five years preceding the date of the offering memorandum, and
  - (iii) the present position of the director or officer with the eligible business or fund or with the fund manager;
- (f) a description of the share and loan capital structure of the eligible business or fund and, where applicable, of the fund manager, including

- (i) particulars of the attributes of the securities offered, including particulars of the terms under which the minimum investment will be dealt with on final disposition, and
  - (ii) any restrictions on the redemption or retraction of the securities under the laws of the place of incorporation or registration of the eligible business or fund;
- (g) information respecting each security holder who owns, directly or indirectly, more than 10 per cent in the aggregate of the voting securities of the eligible business or fund and, where applicable, of the fund manager, including
  - (i) the name and municipality of residence of the security holder,
  - (ii) the number and percentage of securities owned, and
  - (iii) where the security holder is a corporation, the names of the persons who own, directly or indirectly, more than 10 per cent in the aggregate of the voting securities of that corporation;
- (h) particulars of how the total amount of the minimum investments of all the investors will be used by the eligible business or fund, including
  - (i) in the case of an eligible business,
    - (A) a description of the active business operations of the business,
    - (B) a summary of the current business plan giving effect to the active business operations of the business,
    - (C) a statement indicating that all of the minimum investment will be invested in the active business operations of the business within six months after the day on which it is released from escrow to the business and will be maintained in the active business operations of the business until the minimum holding period expires,
    - (D) a statement indicating that none of the minimum investment will be used in artificial transactions or for refinancing, and
    - (E) a breakdown, in tabular form, of the expenditures proposed to be made in respect of the minimum and maximum offerings and a statement that sets out the priority of expenditures if more than the minimum offering but less than the maximum offering is met, and
  - (ii) in the case of a fund,
    - (A) a description of the investment policy of the fund, including any investment restrictions and particulars of how and by whom investment decisions will be made,
    - (B) a statement indicating that at least 70 per cent of the minimum investment will be invested in the active business operations of eligible businesses within nine months after the day on which it is released from escrow to the fund and will be maintained in the active business operations of eligible businesses until the minimum holding period expires,

(C) a statement indicating that investments made by the fund will comply with applicable provincial and federal legislation and guidelines respecting the immigrant investor program,

(D) a statement indicating that none of the minimum investment will be used in artificial transactions or for refinancing, and

(E) a statement indicating the circumstances under which the fund will be permitted to incur debt;

(i) particulars respecting the sale of the securities, including

(i) the price per minimum investment unit,

(ii) the amounts of the minimum offering and maximum offering,

(iii) a statement indicating that if the minimum offering is not met before the offering period expires, the eligible business or fund will, within 30 days after the end of the offering period and as directed by each investor, return all of the minimum investment to the investor or transfer all of the minimum investment to another approved business or fund,

(iv) the manner in which an investor can purchase the securities,

(v) the circumstances under which the minimum investment will be released from escrow to the eligible business or fund,

(vi) a statement indicating that if an investor is refused an immigrant visa as an investor, the eligible business or fund will return all of the investor's minimum investment to the investor, within 90 days after the day on which the investor advises the approved business or fund or, where applicable, the fund manager, in writing, of the refusal to issue the immigrant visa,

(vii) a breakdown of the estimated costs of the offering,

(viii) particulars of any agreements with sales agents and marketing agents and the names and addresses of the principal sales agent and marketing agent, and

(ix) particulars of the relationship between sales agents and marketing agents and the eligible business or fund and, where applicable, the fund manager;

(j) particulars of all fees and expenses, including

(i) all direct and indirect fees, commissions and other expenses incurred in the preparation of the offering memorandum and in the selling of the securities offered,

(ii) all direct and indirect fees, commissions and other expenses payable to sales agents or marketing agents, the escrow agent and, where applicable, the fund manager, including any right to share in any return on investment, that are incurred by the eligible business or fund or the fund manager, and

(iii) all forms of compensation, including fees, salaries, bonuses, expenses and any right to share in any return on investment, that are payable by the eligible business or fund and, where applicable the fund manager to any of the following persons:



- (A) a related person,
- (B) an officer of the eligible business or fund or the fund manager,
- (C) a sales or marketing agent,
- (D) an advisor, including a lawyer, an accountant and an investment advisor,
- (E) an escrow agent, and
- (F) a person who is related, within the meaning of subsections 251(2) and (3) of the *Income Tax Act*, to any of the persons described in clauses (A) to (E);

- (k) a summary of the risk factors relevant to the offering, including
- (i) a statement indicating that an investment in the securities is only one of the requirements for immigration to Canada as an investor and that the investor must satisfy all applicable immigration requirements,
  - (ii) a statement indicating that there is no assurance that an investor will be issued an immigrant visa as an investor,
  - (iii) where applicable, a statement indicating that the minimum investment will be released by the escrow agent to the eligible business or fund for investment, whether or not an immigrant visa as an investor is issued to the investor,
  - (iv) a statement indicating that the securities are speculative,
  - (v) a statement indicating that there is no assurance of a return on the minimum investment of an investor,
  - (vi) a statement indicating that neither the Government of Canada nor the government of the province of investment guarantees the return of the minimum investment and that neither government will be liable for any loss or damages that may be suffered by an investor as a result of purchasing the securities offered,
  - (vii) a statement indicating that the securities offered may not be sold by an investor until the minimum holding period expires,
  - (viii) a summary of the restrictions on the sale of the securities by an investor under the securities laws of the province of investment, and
  - (ix) any additional risk factors particular to the offering;

- (l) a description of the policy to be applied by the eligible business or fund and, where applicable, the fund manager, respecting non-arm's length transactions, including

- (i) the disclosure of any direct or indirect interest in any non-arm's length transaction that is relevant to an investor's interest in the eligible business or fund or in the fund manager, whether that transaction is contemplated, in progress or completed, held by

- (A) a related person,
- (B) an officer of the eligible business or fund or of the fund manager,
- or
- (C) a person who is related, within the meaning of subsections 251(2)

and (3) of the *Income Tax Act*, to any of the persons described in clauses (A) and (B), and

(ii) an indication of whether the eligible business or fund or the fund manager will be permitted to enter into non-arm's length transactions and, where it is permitted to do so,

(A) whether investor approval will be required before a non-arm's length transaction is entered into, and

(B) a statement indicating that, where a non-arm's length transfer of property is contemplated, an independent valuation by an accredited appraiser will be submitted to the Minister and the province of investment and made available for review by investors before the property is transferred;

(m) a description of any existing or potential conflicts of interest and the policy regarding conflicts of interest that result from the relationship between the eligible business or fund or, where applicable, the fund manager, and

(i) a related person,

(ii) an officer of the eligible business or fund or of the fund manager,

(iii) a sales or marketing agent,

(iv) an advisor, including a lawyer, an accountant and an investment advisor, or

(v) a person who is related, within the meaning of subsection 251(2) and (3) of the *Income Tax Act*, to any of the persons described in subparagraphs

(i) to (iv);

(n) a summary of the income tax consequences in Canada of an investment in the securities offered, including the following statement, namely,

"Investors should consult with their professional advisors regarding the tax consequences applicable to them.";

(o) the names and addresses of the lawyers and accountants of the eligible business or fund and, where applicable, the fund manager;

(p) the name and address of the escrow agent, a summary of the escrow agreement and a statement that the escrow agent will hold the certificates representing the investor's securities until the minimum holding period expires;

(q) a summary of all material contracts relevant to the offering, and the place where and time when the material contracts may be reviewed by investors during the offering period;

(r) particulars of any other fact related to the offering that has not been disclosed elsewhere in the offering memorandum;

(s) a list of the financial statements and other documents that the eligible business or fund or, where applicable, the fund manager will send to investors;

(t) a summary of the rights available to an investor under the securities laws

of the province of investment, and a statement indicating that an investor may withdraw from an agreement to purchase the securities offered if, within two business days after the later of the day on which the investor signs the agreement to purchase the securities and the day on which the investor receives the offering memorandum, the investor gives the eligible business or fund or, where applicable, the fund manager written notice of the investor's intention not to be bound by the agreement;

(u) the following statement, on the last page, dated and signed, as a person applying for the approval of the Minister for the eligible business or fund, by each person who manages or controls, and all the directors of, the eligible business or fund and, where applicable, the fund manager, and all security holders referred to in paragraph (g):

“The foregoing is full, true and plain disclosure of all material facts relating to the securities offered by this offering memorandum and contains no misrepresentation.”; and

(v) an appendix that contains

(i) financial information in respect of the eligible business or fund and, where applicable, the fund manager, including

(A) financial statements for each of the last three completed financial years, in the form required by the laws of the place of incorporation or registration of the eligible business or fund and the fund manager,

(B) where the last period reported pursuant to clause (A) is more than 120 days before the date of the offering memorandum, interim unaudited financial statements as at a date not more than 60 days before the date of the offering memorandum, and

(C) where a financial year has not been completed, and interim unaudited financial statements as at a date not more than 60 days before the date of the offering memorandum,

(ii) where it is relevant to the intended use, by an eligible business, of the minimum investment, forecast financial information in accordance with generally accepted accounting principles as recommended in the *Handbook of the Canadian Institute of Chartered Accountants*,

(iii) any document that an investor will be required to sign before purchasing the securities offered, including

(A) the agreement to purchase the securities, and

(B) if applicable, the agreement referred to in subparagraph 6.14(1)(c)(ii) of these Regulations,

(iv) the escrow agreement, and

(v) all other relevant documents.



**SCHEDULE XI**  
**(Paragraph 6.16(a))**

**CONTENTS OF AN APPROVED BUSINESS OR FUND QUARTERLY REPORT**

**1. An approved business or fund quarterly report shall include the following information respecting an approved business or fund:**

- (a) the title of the offering memorandum, including the registered address of the approved business or fund and the file number assigned by the Minister;**
- (b) the name, address, telephone number and facsimile number, and the name and title of a contract person, of the approved business or fund or, where applicable, of the fund manager;**
- (c) the name, address, telephone number and facsimile number, and the name of a contact person, of the escrow agent;**
- (d) a list of the investors, including, in respect of each investor,**
  - (i) the investor's first name and surname,**
  - (ii) the investor's date of birth,**
  - (iii) the file number of the investor's application for an immigrant visa as an investor,**
  - (iv) the visa office at which that application was made,**
  - (v) the total amount of the minimum investment of the investor that is held in escrow and the date on which that amount was placed in escrow, and**
  - (vi) the total amount of the minimum investment of the investor that has been released from escrow, and the date on which that amount was released from escrow;**
- (e) the total amount of the minimum investments held in escrow;**
- (f) the total amount of the minimum investments that have been released from escrow to the approved business or fund and the purpose for which the minimum investments are used;**
- (g) the total amount of the minimum investments that are invested in the active business operations of the approved business or, in the case of an approved fund, of the eligible businesses;**
- (h) a statement, signed by each person who manages or controls the approved business or fund or by an authorized signing officer of the approved business or fund, indicating that, during the period covered by the quarterly report, the approved business or fund has complied with the terms and conditions referred to in sections 6.14 and 6.15 of these Regulations;**
- (i) the date on which each investment was invested in the active business operations of the approved business or, in the case of an approved fund, of each eligible business;**
- (j) the total number of full-time jobs created or continued in Canada as a result of the investor's minimum investments;**

(k) the total number of part-time jobs created or continued in Canada as a result of the investors' minimum investments;

(l) in the case of an approved fund, for each eligible business in which the approved fund invests, the following information:

(i) the name, address, telephone number and facsimile number, and the name of a contact person, of the eligible business,

(ii) a list of the directors and officers of the eligible business,

(iii) a list of the persons who own, directly or indirectly, more than 10 per cent in the aggregate of the voting shares of the eligible business, including each person's address, nationality and percentage of ownership,

(iv) a brief description of the active business operations of the eligible business,

(v) the location of the active business operations of the eligible business,

(vi) the total assets of the eligible business, including the assets of a corporation that is associated with the eligible business, within the meaning of section 256 of the *Income Tax Act*,

(vii) the amount of each investment,

(viii) a description and the terms of the security received by the fund, and

(ix) the purpose for which the investment will be used; and

(m) where the minimum holding period has expired and there has been a final disposition in respect of each investor, the following information respecting each investor;

(i) the current address in Canada of the investor,

(ii) a summary of all financial transactions between the investor and the approved business or fund and the date that each transaction occurred,

(iii) the instrument, namely, cash, shares, debentures or any other instrument, that was used to repay the investor, and, where applicable, an estimate of the value of the instrument, and

(iv) after each final disposition, a report respecting the status of the project of which the active business operations are a part.

# Indochinese Designated Class Regulations

## SOR/78-931

Am. SOR/79-810; SOR/80-908; SOR/83-34; SOR/84-852; SOR/87-11; SOR/88-29; SOR/89-14; SOR/89-498; SOR/90-43; SOR/90-626; SOR/91-111; SOR/91-159.

### REGULATIONS RESPECTING THE DESIGNATION OF AN INDOCHINESE DESIGNATED CLASS

#### Short Title

1. These Regulations may be cited as the *Indochinese Designated Class Regulations*.

#### Interpretation

2. In these Regulations,
- “Indochinese Designated Class” means a class of persons the members of which
- (a) are citizens or habitual residents of a country listed in the schedule;
  - (b) have left their country of citizenship or former habitual residence subsequent to April 30, 1975;
  - (c) have not become permanently resettled;
  - (d) are unwilling or unable to return to their country of citizenship or former habitual residence;
  - (e) [Revoked SOR/84-852];
  - (f) are outside Canada and seeking resettlement in Canada; and
  - (g) arrived in Hong Kong, Thailand, Malaysia, Singapore, Indonesia, the Philippines, Korea, Taiwan, Japan or Macao after April 30, 1975.

#### Designation of Class

3. The Indochinese Designated Class is hereby designated for the purpose of subsection 6(2) of the *Immigration Act* as a class the admission of members of which would be in accordance with Canada’s humanitarian tradition with respect to the displaced and the persecuted.

#### Application of Immigration Regulations, 1978

4. Members of the Indochinese Designated Class are exempt from sections 7 to 9 and subsection 14(1) of the *Immigration Regulations, 1978*.



### Implementation

5. (1) Where a visa officer has determined that a person is a member of the Indochinese Designated Class, the visa officer, for the purpose of determining whether that member and his dependants will be able to become successfully established in Canada, shall take into consideration

- (a) each of the factors listed in column I of Schedule I to the *Immigration Regulations, 1978*;
- (b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that member and his accompanying dependants; and
- (c) any other financial or other assistance available in Canada for such members.

(1.1) Subject to the conditions set out in subsection (2), any of the following persons may seek to facilitate the admission or arrival in Canada of a member of the Indochinese Designated Class and the member's accompanying dependants:

- (a) an individual, if the individual is a member of a group of not less than five individuals, each of the members of which is a Canadian citizen or permanent resident, has attained at least 18 years of age and resides in the expected community of settlement; and
- (b) a corporation, if the corporation is incorporated under the laws of Canada or a province and has representatives in the expected community of settlement.

(2) The conditions under which the admission to or arrival in Canada of a member of the Indochinese Designated Class and the member's accompanying dependants may be facilitated are as follows:

- (a) each member of the group or the corporation has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of the Indochinese Designated Class and that member's accompanying dependants for a period of one year;
- (b) no member of the group nor the corporation is in default with respect to any other undertaking given with respect to any Convention refugee or the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the *Immigration Act* for the purpose of subsection 6(2) of that Act or the member's dependants; and
- (c) the members of the group or the corporation
  - (i) will make or have made adequate arrangements in the expected community of settlement for the reception of the member of the Indochinese Designated Class and the member's accompanying dependants, and
  - (ii) have sufficient financial resources and expertise to fulfil the undertaking referred to in paragraph (a).

(2.1) Subject to subsection (2.2), an individual who is a Canadian citizen or permanent resident and has attained at least eighteen years of age may seek to facilitate the admission or arrival in Canada of a member of the Indochinese Designated Class who has not attained eighteen years of age, has no dependants and has to support himself, if

(a) that individual has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of the Indochinese Designated Class

(i) for the period of at least one year, and

(ii) where the member has not attained eighteen years of age at the end of the period referred to in subparagraph (i), until the member attains eighteen years of age;

(b) no party to an undertaking referred to in paragraph (a) is in default in respect of any other undertaking given with respect to any Convention refugee or the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the *Immigration Act* for the purpose of subsection 6(2) of that Act or the member's dependants; and

(c) an immigration officer is satisfied that

(i) the parties to the undertaking referred to in paragraph (a) have sufficient financial resources and expertise to fulfil the undertaking, and

(ii) the individual has obtained from the child welfare authority of the government of the province in which he resides a statement in writing that he is considered suitable to be granted legal guardianship or custody of that member of the Indochinese Designated Class on the arrival in Canada of that member.

(2.2) Where an agreement entered into, pursuant to subsection 108(2) of the *Immigration Act*, by the Minister and the province in which an individual referred to in paragraph (2.1)(a) resides requires that a joint undertaking be given by the individual and four or more Canadian citizens or permanent residents who have attained 18 years of age, the undertaking referred to in paragraph (2.1)(a) shall be such a joint undertaking.

(3) Where a member of the Indochinese Designated Class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to him and his accompanying dependants, if he and his accompanying dependants

(a) meet the requirements of the *Immigration Act*, those provisions of the *Immigration Regulations, 1978* from which they are not exempted by section 4 of these Regulations and these Regulations; and

(b) where the member and the member's accompanying dependants intend

to reside in a place in Canada other than the Province of Quebec, will, in the opinion of the visa officer, be able to become successfully established in Canada; and

(c) where the member and the member's accompanying dependants intend to reside in the Province of Quebec, will, in the opinion of the Minister of Cultural Communities and Immigration of that Province based on regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, be able to become successfully established in that Province.

### Duration

#### 6. [Revoked SOR/90-43.]

### SCHEDULE

(s. 2)

Country
Democratic Kampuchea

*Nguyen v. Canada (Min. of Employment & Immigration)* (1993), 20 Imm. L.R. (2d) 231, [1994] 1 F.C. 232, 16 Admin. L.R. (2d) 1, 156 N.R. 212 (C.A.), leave to appeal to S.C.C. refused (1994), 17 Admin. L.R. (2d) 67n, 22 Imm. L.R. (2d) 159n (S.C.C.).

The appellant Luong Manh Nguyen left Viet Nam in the years following the fall of the South Vietnamese government in 1975. His brother, Dai Nguyen, is a Canadian citizen and was part of a church group which sponsored the appellant's immigration to Canada. The sponsorship application was made pursuant to the Indochinese Designated Class Regulations, SOR/78-931, which provide that people from certain countries of Indochina may be permitted to enter Canada without having to comply with the normal requirements for immigration and without having to fall within the definition of Convention refugees.

The sponsorship application "came up for processing" in the Visa Section of the Office of Commissioner for Canada in Hong Kong. Luong Manh Nguyen was in the detention camp in Hong Kong awaiting repatriation to Viet Nam with the result that he was unable to attend at the Office of The Commissioner to obtain and complete an application for landing. Canadian Immigration Officials declined to go to the camp and provide Luong Manh Nguyen with an application.

The Court of Appeal (the Chief Justice dissenting) was of the view that the visa officers at The Canadian Commission in Hong Kong were under a duty to furnish the appellant, Luong Manh Nguyen, with an application for landing upon request. Accordingly, the appeal from the Motions Judge, who had dismissed this application, was allowed



and an order in the nature of *certiorari* and *mandamus* was made requiring the visa officers to furnish the appellant with an application for landing.

The Chief Justice in his dissent reviewed the history of the Indochinese Designated Class Regulations.

# Indochinese Designated Class (Transitional) Regulations

SOR/90-627

Am. SOR/91-112; SOR/91-160; SOR/92-589; SOR/94-482.

## REGULATIONS RESPECTING THE DESIGNATION OF AN INDOCHINESE DESIGNATED CLASS (TRANSITIONAL)

### Short Title

1. These Regulations may be cited as the *Indochinese Designated Class (Transitional) Regulations*.

### Interpretation

2. (1) In these Regulations,

“Act” means the *Immigration Act*; (*Loi*)

“Indochinese Designated Class (Transitional)” means a class of persons the members of which

- (a) are citizens or habitual residents of a country listed in the schedule;
- (b) have left their country of citizenship or former habitual residence after April 30, 1975;
- (c) have not become permanently resettled;
- (d) are unwilling or unable to return to their country of citizenship or former habitual residence;
- (e) are outside Canada and seeking resettlement in Canada; and
- (f) arrived in

(i) Hong Kong before June 16, 1988, or Thailand, Malaysia, Singapore, Indonesia, the Philippines, Korea, Taiwan, Japan or Macau before March 14, 1989, or

(ii) a country set out in subparagraph (i) after the applicable date set out in that subparagraph and have been determined to be Convention refugees under the Convention refugee determination system of the country of refuge. (*catégorie désignée d'Indochinois (période transitoire)*)

(2) The definition “Indochinese Designated Class (Transitional)” in subsection (1) is retroactive and applies in respect of all applications for landing made by members of the Indochinese Designated Class (Transitional) pending on July 15, 1994.

### Designation of a Class

3. The Indochinese Designated Class (Transitional) is hereby designated for the purpose of subsection 6(2) of the Act as a class the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted.

### Exemption

4. Members of the Indochinese Designated Class (Transitional) are exempt from sections 7 to 9 and subsection 14(1) of the *Immigration Regulations, 1978*.

### Implementation

5. (1) Where a visa officer has determined that a person is a member of the Indochinese Designated Class (Transitional), the visa officer, for the purpose of determining whether that member and the member's dependants will be able to become successfully established in Canada, shall take into consideration

(a) each of the factors listed in column 1 of Schedule I to the *Immigration Regulations, 1978*;

(b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that member and the member's accompanying dependants; and

(c) any other financial or other assistance available in Canada for that member and that member's dependants.

(2) Subject to the conditions set out in subsection (3), any of the following persons may seek to facilitate the admission or arrival in Canada of a member of the Indochinese Designated Class (Transitional) and the member's accompanying dependants:

(a) an individual, if the individual is a member of a group of not less than five individuals, each of the members of which is a Canadian citizen or permanent resident, has attained at least 18 years of age and resides in the expected community of settlement; and

(b) a corporation, if the corporation is incorporated under the laws of Canada or a province and has representatives in the expected community of settlement.

(3) The conditions under which the admission to or arrival in Canada of a member of the Indochinese Designated Class (Transitional) and the member's accompanying dependants may be facilitated are as follows:

(a) each member of the group or the corporation referred to in subsection (2) has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of



the Indochinese Designated Class (Transitional) and that member's accompanying dependants for a period of one year;

(b) neither any member of the group nor the corporation referred to in subsection (2) is in default with respect to any other undertaking given with respect to any Convention refugee or any of the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the Act for the purpose of subsection 6(2) of the Act or any of the member's dependants; and

(c) the members of the group or the corporation referred to in subsection (2)

(i) will make or have made adequate arrangements in the expected community of settlement for the reception of the member of the Indochinese Designated Class (Transitional) and the member's accompanying dependants, and

(ii) have sufficient financial resources and expertise to fulfil the undertaking referred to in paragraph (a).

(4) Subject to subsection (5), an individual who is a Canadian citizen or permanent resident and has attained at least 18 years of age may seek to facilitate the admission or arrival in Canada of a member of the Indochinese Designated Class (Transitional) who has not attained 18 years of age, has no dependants and has to be self-supporting, if

(a) the individual has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of the Indochinese Designated Class (Transitional)

(i) for a specified period of at least one year, and

(ii) where the member has not attained 18 years of age at the end of the period referred to in subparagraph (i), until the member attains 18 years of age;

(b) the individual who has made an undertaking referred to in paragraph (a) is not in default in respect of any other undertaking given with respect to any Convention refugee or any of the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the Act for the purpose of subsection 6(2) of the Act or any of the member's dependants;

(c) an immigration officer is satisfied that the individual who has given the undertaking referred to in paragraph (a) has sufficient financial resources and expertise to fulfil the undertaking; and

(d) the individual has obtained from the child welfare authority of the government of the province in which the individual resides a statement in writing that the individual is considered suitable to be granted legal guardianship or custody of the member of the Indochinese Designated Class (Transitional) on the arrival in Canada of that member.

(5) Where an agreement entered into, pursuant to subsection 108(2) of the Act, by the Minister and the province in which an individual referred to in paragraph (4)(a) resides requires that a joint undertaking be given by the individual and four or more Canadian citizens or permanent residents who have attained at least 18 years of age, the undertaking referred to in paragraph (4)(a) shall be such a joint undertaking.

(6) Subject to subsections (7) to (9), where a member of the Indochinese Designated Class (Transitional) makes an application for an immigrant visa, a visa officer may issue an immigration visa to that member and the member's accompanying dependants, if the member and the accompanying dependants

(a) meet the requirements of the Act, the provisions of the *Immigration Regulations, 1978*, except those provisions from which they are exempted by section 4 of these Regulations, and these Regulations; and

(b) where the member and the member's accompanying dependants intend to reside

(i) in a place in Canada other than the Province of Quebec, will, in the opinion of the visa officer, be able to become successfully established in Canada, and

(ii) in the Province of Quebec, will, in the opinion of the Minister of Cultural Communities and Immigration of that Province based on regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, be able to become successfully established in that Province.

(7) No immigrant visa on the basis of being a Convention refugee shall be issued to a person who has been determined by a visa officer to be a member of the Indochinese Designated Class (Transitional) or to any accompanying dependant of that person.

(8) Subject to subsection (9), no immigrant visa shall be issued to a member of the Indochinese Designated Class (Transitional) or to any accompanying dependant of the member on the basis of being a member of any other prescribed class where the member has been determined not to be a Convention refugee under the Convention refugee determination system of the country of refuge.

(9) Subsection (8) does not apply where the member of the Indochinese Designated Class (Transitional) makes an application for an immigrant visa in the member's country of citizenship or, where the member is not a citizen of any country, in the member's country of habitual residence.

(10) Subsections (6) to (9) are retroactive and apply in respect of all applications for landing made by members of the Indochinese Designated Class (Transitional) pending on July 15, 1994.

**SCHEDULE**  
*(Section 2)*

Country
Peoples Democratic Republic of Laos
Socialist Republic of Viet Nam



# Self-Exiled Persons Designated Class Regulations

## SOR/78-933

Am. SOR/80-334; SOR/80-910; SOR/83-35; SOR/84-851; SOR/85-244;  
SOR/87-10; SOR/89-13; SOR/89-386; SOR/90-44; SOR/90-533.

### REGULATIONS RESPECTING THE DESIGNATION OF A SELF-EXILED PERSONS CLASS

#### Short Title

1. These Regulations may be cited as the *Self-Exiled Persons Designated Class Regulations*.

#### Interpretation

2. In these Regulations,

“Self-Exiled Persons Designated Class” means a class of persons the members of which

(a) are citizens, former citizens or former residents of a country listed in Schedule I,

(b) are outside Canada and are not residing or sojourning in any of the countries listed in Schedule I or II,

(b.1) [Revoked SOR/85-244],

(c) are unwilling or unable to return to their country of citizenship or former habitual residence,

(d) have not become permanently resettled,

(e) are seeking resettlement in Canada, and,

(f) on or before August 31, 1990,

(i) are determined to be members of the class by a visa officer pursuant to subsection 5(1), or

(ii) are the subject of a written undertaking given to the Minister pursuant to subsection 5(3).

#### Designation of Class

3. The Self-Exiled Persons Designated Class is hereby designated for the purpose of subsection 6(2) of the *Immigration Act* as a class the admission of members of which would be in accordance with Canada’s humanitarian tradition with respect to the displaced and the persecuted.

### Application of Immigration Regulations, 1978

4. Members of the Self-Exiled Persons Designated Class are exempt from sections 7 to 9 and subsection 14(1) of the *Immigration Regulations, 1978*.

#### Implementation

5. (1) Where a visa officer has determined that a person is a member of the Self-Exiled Persons Designated Class, the visa officer, for the purpose of determining whether that member and that member's dependants will be able to become successfully established in Canada, shall take into consideration

(a) each of the factors listed in column I of Schedule I to the *Immigration Regulations, 1978*;

(b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that member and his accompanying dependants; and

(c) any other financial or other assistance available in Canada for such members.

(2) Subject to the conditions set out in subsection (3), any of the following persons may seek to facilitate the admission or arrival in Canada of a member of the Self-Exiled Persons Designated Class and that member's accompanying dependants:

(a) an individual, if the individual is a member of a group of not less than five individuals, each of the members of which is a Canadian citizen or permanent resident, has attained at least 18 years of age and resides in the expected community of settlement; and

(b) a corporation, if the corporation is incorporated under the laws of Canada or a province and has representatives in the expected community of settlement.

(3) The conditions under which the admission or arrival in Canada of a member of the Self-Exiled Persons Designated Class and that member's accompanying dependants may be facilitated are as follows:

(a) each member of the group or the corporation has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of the Self-Exiled Persons Designated Class and that member's accompanying dependants for a period of one year;

(b) no member of the group nor the corporation is in default with respect to any other undertaking given with respect to any Convention refugee or the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the *Immigration Act* for the purpose of subsection 6(2) of that Act or the member's dependant's; and

(c) the members of the group or the corporation

(i) will make or have made adequate arrangements in the expected community of settlement for the reception of the member of the Self-Exiled Persons Designated Class and that member's accompanying dependants, and

(ii) have sufficient financial resources and expertise to fulfil the undertaking referred to in paragraph (a).

(4) Where a member of the Self-Exiled Persons Designated Class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if that member and that member's accompanying dependants

(a) meet the requirements of the *Immigration Act*, those provisions of the *Immigration Regulations, 1978* from which they are not exempted by section 4 of these Regulations and these Regulations; and

(b) will, in the opinion of the visa officer, be able to become successfully established in Canada.

#### Duration

6. [Revoked SOR/90-44.]

#### SCHEDULE I

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##### Country

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Albania  
Bulgaria  
Czechoslovakia  
German Democratic Republic  
Hungary  
Poland  
Romania  
Union of Soviet Socialist Republics

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#### SCHEDULE II

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##### Country

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Yugoslavia

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# **Political Prisoners and Oppressed Persons Designated Class Regulations SOR/82-977**

Am. SOR/83-533; SOR/84-212; SOR/84-853; SOR/87-9;  
SOR/88-624; SOR/89-15; SOR/89-499; SOR/90-42; SOR/91-158; SOR/91-645.

## **REGULATIONS RESPECTING THE DESIGNATION OF A POLITICAL PRISONERS AND OPPRESSED PERSONS DESIGNATED CLASS**

### **Short Title**

1. These Regulations may be cited as the *Political Prisoners and Oppressed Persons Designated Class Regulations*.

### **Interpretation**

2. In these Regulations,

“Political Prisoners and Oppressed Persons Designated Class” means a class of persons the members of which are in their country of citizenship, are citizens of a country listed in the schedule, are seeking resettlement in Canada and,

(a) as a direct result of acts that in Canada would be considered a legitimate expression of free thought or a legitimate exercise of civil rights pertaining to dissent or to trade union activity, have been

(i) detained or imprisoned for a period exceeding 72 hours with or without charge, or

(ii) subjected to some other recurring form of penal control, or

(b) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of the protection of their country of citizenship.

### **Designation of Class**

3. The Political Prisoners and Oppressed Persons Designated Class is hereby designated for the purpose of subsection 6(2) of the *Immigration Act* as a class the admission of members of which would be in accordance with Canada’s humanitarian tradition with respect to the displaced and the persecuted.

**Exemption — Immigration Regulations, 1978**

4. Members of the Political Prisoners and Oppressed Persons Designated Class are exempt from sections 7 to 9 and subsection 14(1) of the *Immigration Regulations, 1978*.

**Implementation**

5. (1) Where a visa officer determines that a person is a member of the Political Prisoners and Oppressed Persons Designated Class, the visa officer, for the purpose of determining whether that member and his dependants will be able to become successfully established in Canada, shall take into consideration

(a) each of the factors listed in column I of Schedule I to the *Immigration Regulations, 1978*;

(b) whether any person in Canada is seeking to facilitate the admission or arrival in Canada of that member and his accompanying dependants; and

(c) any financial or other assistance available in Canada for such members.

(2) Subject to the conditions set out in subsection (2.1), any of the following persons may seek to facilitate the admission to or arrival in Canada of a member of the Political Prisoners and Oppressed Persons Designated Class and the member's accompanying dependants:

(a) an individual, if the individual is a member of a group of not less than five individuals, each of the members of which is a Canadian citizen or permanent resident, has attained at least 18 years of age and resides in the expected community of settlement; and

(b) a corporation, if the corporation is incorporated under the laws of Canada or a province and has representatives in the expected community of settlement.

(2.1) The conditions under which the admission or arrival in Canada of a member of the Political Prisoners and Oppressed Persons Designated Class and that member's accompanying dependants may be facilitated are as follows:

(a) each member of the group or the corporation has given a written undertaking to the Minister to make provision for lodging, care, maintenance and resettlement assistance for the member of the Political Prisoners and Oppressed Persons Designated Class and the member's accompanying dependants for a period of one year;

(b) no member of the group nor the corporation is in default with respect to any other undertaking given with respect to any Convention refugee or the refugee's dependants or any member of a class designated by the Governor in Council under paragraph 114(1)(d) of the *Immigration Act* for the purpose of subsection 6(2) of that Act or the member's dependants; and

## (c) the members of the group or the corporation

(i) will make or have made adequate arrangements in the expected community of settlement for the reception of the member of the Political Prisoners and Oppressed Persons Designated Class and the member's accompanying dependants, and

(ii) have sufficient financial resources and expertise to fulfil the undertaking referred to in paragraph (a).

(3) Where a member of the Political Prisoners and Oppressed Persons Designated Class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to him and his accompanying dependants if he and his accompanying dependants

(a) meet the requirements of the *Immigration Act*, those provisions of the *Immigration Regulations, 1978* from which they are not exempted by section 4 of these Regulations and these Regulations;

(b) where the member and the member's accompanying dependants intend to reside in a place in Canada other than the Province of Quebec, will, in the opinion of the visa officer, be able to become successfully established in Canada; and

(c) where the member and the member's accompanying dependants intend to reside in the Province of Quebec, will, in the opinion of the Minister of Cultural Communities and Immigration of that Province based on regulations made under *An Act respecting the Ministère des Communautés culturelles et de l'Immigration* (R.S.Q., 1977, c. M-23.1), as amended from time to time, be able to become successfully established in that Province.

## Duration

## 6. [Revoked SOR/90-42.]

## SCHEDULE

(s. 2)

## Country

El Salvador

Guatemala



# Refugee Claimants Designated Class Regulations

SOR/90-40

Am. SOR/92-13; SOR/92-722; SOR/94-21.

REGULATIONS RESPECTING THE DESIGNATION  
OF A REFUGEE CLAIMANTS DESIGNATED CLASS  
AND CERTAIN EXEMPTIONS THAT APPLY  
TO THAT CLASS

## Short Title

1. These Regulations may be cited as the *Refugee Claimants Designated Class Regulations*.

## Interpretation

2. In these Regulations,

“Act” means the *Immigration Act*;

“dependant” in respect of a member of the Refugee Claimants Designated Class, means a dependant as defined in paragraph (a) of the definition “dependant” in subsection 2(1) of the *Immigration Regulations, 1978* who is in Canada on the day an application for landing is made by that member;

“Refugee Claimants Designated Class” means a class of persons designated pursuant to section 3.

## Designation of Class

3. (1) Subject to subsection (2), the Refugee Claimants Designated Class is hereby designated for the purpose of subsection 6(2) of the Act as a class the admission of members of which would be in accordance with Canada’s humanitarian tradition with respect to the displaced and the persecuted, and shall consist of those persons who

(a) were in Canada on January 1, 1989 or had been directed back, prior to that date, to the United States pursuant to subsection 23(5) of the Act, to await the availability of an adjudicator for an inquiry scheduled to be held on or after that date;

(b) signified, before January 1, 1989, an intention to make a claim to be a Convention refugee

(i) to an immigration officer, who recorded that intention before that date,

or to a person acting on behalf of an immigration officer, who an immigration officer is satisfied recorded that intention before that date,  
(ii) to an adjudicator prior to the conclusion of an inquiry respecting those persons' status in Canada; and

(c) have been determined to have a credible basis for their claim to be a Convention refugee pursuant to

(i) subsection 46.01(6) or (7) of the Act, or

(ii) subsection 43(1) of an *Act to amend the Immigration Act and to amend other Acts in consequence thereof*, R.S., c. 28 (4th Supp.).

(2) The Refugee Claimants Designated Class shall not include a person who

(a) has been determined to be a Convention refugee under the Act as it read before January 1, 1989;

(b) is the subject of a removal order or a departure notice and has not been removed from or otherwise left Canada;

(c) has made an application for landing pursuant to these Regulations or the *Refugee Claims Backlog Regulations*, as it read before its revocation by Order in Council P.C. 1989-467 on March 23, 1989, which application has been refused;

(d) has failed to appear for

(i) an examination that was adjourned pursuant to subsection 12(3) of the Act,

(ii) an inquiry respecting that person's status in Canada or for the continuation of such an inquiry for which the person was given an appointment, or

(iii) an examination under oath with respect to a claim to be a Convention refugee or for the continuation of such an examination for which the person was given an appointment;

(e) is described in any of paragraphs 19(1)(c) to (g), (j) or 27(2)(c) of the Act;

(f) left Canada after the coming into force of these Regulations and remained outside Canada for more than seven days;

(g) is determined by the Refugee Division not to be a Convention refugee;  
or

(h) has not, on or before December 11, 1992, provided to an immigration officer sufficient current information in respect of that person's whereabouts in Canada for a hearing to be initiated for the purpose of making the determination referred to in paragraph (1)(c).

### Application for Landing

4. A member of the Refugee Claimants Designated Class may make an application for landing to an immigration officer.

### Exemption

5. For the purpose of an application for landing made pursuant to section 4, a member of the Refugee Claimants Designated Class and the dependants of that member are exempt from the requirements of subsection 9(1) of the Act and sections 4 to 11 and subsection 14(1) of the *Immigration Regulations, 1978*.

### Implementation

6. (1) Subject to subsections (2) to (4), where a member of the Refugee Claimants Designated Class makes an application for landing, an immigration officer may grant landing to the member and the member's dependants if the member and the dependants meet the requirements of the Act and of the *Immigration Regulations, 1978* except those from which they are exempt under section 5.

(2) An immigration officer may refuse to grant landing to a member of the Refugee Claimants Designated Class and the member's dependants if the member or any of the member's dependants refuses to be photographed or fingerprinted under subsection 44(2) of the *Immigration Regulations, 1978*.

(3) Where an immigration officer is of the opinion that the information provided to that officer by a member of the Refugee Claimants Designated Class or a dependant of the member in respect of the member's application for landing or the dependant's application is insufficient or where the officer has reasonable grounds to doubt the accuracy of the information, that officer may request additional information or verification of the information before granting or refusing landing.

(4) An immigration officer who grants landing may subject the landing to the term or condition that the person report for medical observation or treatment at a time and place specified by the officer.

*Ken Yhap v. Canada (Min. of Employment & Immigration)* (1990), 9 Imm. L.R. (2d) 243 (Fed. T.D.).

The applicant indicated an intention to claim refugee status in Canada prior to January 1, 1989 and was included in the backlog clearance program established by the Minister. The Minister refused to consider the applicant under the operation's memorandum dealing with Chinese nationals who had temporary status in Canada. That policy was not intended to replace provisions which have been made for refugees whether recent arrivals or members of the backlog from the People's Republic of China but rather was intended to act as a supplemental protection for other individuals from that country. Regardless of what promises and what guarantees have been made by the Minister, the applicant is entitled, by virtue of section 114(2) to a review as to whether humanitarian and compassionate grounds exist sufficient to warrant landing in Canada. This law must be applied evenly to all persons. The discretion conferred by section 114(2) is not to be exercised by the Minister and her officials subject to inflexible and self-imposed



limitations, although an expression of flexible general policy, such as that contained in chapter 9 of the Immigration Manual, would be entirely lawful. The policy directives and guidelines pertaining to the humanitarian and compassionate review portion of the backlog clearance program were set out in a document entitled "Refugee Claimants Backlog Procedures". These guidelines limit their application to particular classes of persons, mainly "members of official delegations, athletic teams or cultural groups", and persons in "family dependency situations" described more specifically in the guidelines. Officers have not been questioning applicants on humanitarian and compassionate issues which fall outside the designated criteria. These policy guidelines constituted a fetter on the statutory power of the Governor-in-Council to both exempt persons from the requirement of section 9(1) of the Act and to authorize the landing of persons for humanitarian and compassionate reasons pursuant to section 114(2). The applicant is entitled to a full and fair review to determine the existence of humanitarian or compassionate considerations. The right to this review was confirmed by the Supreme Court of Canada in *Min. of Employment & Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565 and this consideration is to take place independently of the consideration of the basic merits of any other application advanced by the applicant. Even in the case where it is evident that all other claims and applications advanced by the applicant are doomed to failure, the applicant's right to consideration on humanitarian and compassionate grounds may not be unduly restricted. A factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.

The discretion afforded an immigration officer by section 114(2) is wide. The officer is asked to consider reasons of public policy as well as the existence of compassionate or humanitarian considerations. Neither the section of the Immigration Act which sets out definitions of terms nor the regulations describe in any greater detail how this section is to be applied nor what interpretation the officer is to give to the rather broad terms contained in this section. Chapter 9 of the Immigration Manual assists an officer in assessing situations and the humanitarian and compassionate issues raised by them which include problems with spouses, family dependencies, difficulties with return to the country of origin, illegal de facto residents, and situations involving marriage breakdowns. By comparison, the guidelines contained in "Refugee Claimants Backlog Procedures" are rigid and inflexible. These criteria are limited and refer only to a carefully selected segment of the backlog population. Applicants who are not members of official delegations, athletic teams or cultural groups and who are not close family members of Canadian residents are excluded from the review subject to these criteria. Chapter 9, on the other hand, constitutes a general policy or rough "rules of thumb" which are appropriate and lawful structuring of the discretion conferred by section 114(2). These guidelines might have acted as a model for the drafting of guidelines to be used in conjunction with a humanitarian and compassionate review of refugee claimants in the backlog. Accordingly, the decision of the immigration officer at the backlog clearance centre with respect to the respondent was quashed and an order in the nature of *mandamus* was issued compelling the Minister to provide the applicant with a full and fair interview of his humanitarian and compassionate claim.

## 7. [Revoked SOR/94-21, s.1]

# **Immigration Act Fees Regulations**

**SOR/86-64**

**Am. SOR/86-723; SOR/86-821; SOR/89-289; SOR/89-457; SOR/89-546; SOR/90-31;  
SOR/90-203; SOR/91-244; SOR/91-515; SOR/92-185; SOR/92-499; SOR/93-144; SOR/  
94-389.**

**established by  
P.C. 1985-3767**

**REGULATIONS PRESCRIBING THE FEES PAYABLE  
FOR PROCESSING APPLICATIONS MADE  
PURSUANT TO THE IMMIGRATION ACT**

## **Short Title**

- 1. These Regulations may be cited as the *Immigration Act Fees Regulations*.**

## **Interpretation**

- 2. The definitions in section 2 of the *Immigration Act* and subsection 2(1) of the *Immigration Regulations*, 1978 apply to these Regulations.**

## **Fees for Processing Applications for Landing**

- 3. (1) The fee prescribed in paragraph 1(a) of the schedule is payable, at the time an application for landing is made, by**

- (a) a person whom a visa officer has determined to be a Convention refugee seeking resettlement;**
- (b) a member of a class of persons designated by the Governor in Council, other than the Refugee Claimants Designated Class within the meaning of section 2 of the *Refugee Claimants Designated Class Regulations*; and**
- (c) a citizen of a country with which Canada has entered into an agreement whereby neither country is to charge for the processing of an application for landing.**

- (2) Subject to subsection (4), the fee prescribed in paragraph 1(b) of the schedule is payable, at the time an application for landing is made, by an applicant other than an applicant referred to in subsection (1), (7) or (9).**

- (3) Subject to subsection (4), the fee payable, at the time an application for landing is made, by each dependant or by an applicant referred to in subsection (2) in respect of each dependant, for the processing of an application for landing is**

- (a) the fee prescribed in paragraph 1(c) of the schedule, in the case of a dependant who is not a spouse and who is under 19 years of age; and
- (b) the fee prescribed in paragraph 1(d) of the schedule, in the case of a dependant who is a spouse or who is 19 years of age or older.

(4) The fee prescribed in paragraph 1(b), (c) or (d) of the schedule is payable by a sponsor, at the time an undertaking is submitted by the sponsor in support of an application for landing made by a member of the family class and any dependant of the member, unless the member or dependant has already paid the fee.

(5)-(6) [Revoked SOR/94-389.]

(7) The fee prescribed in paragraph 2(a) of the schedule is payable by an entrepreneur, an investor or a self-employed person at the time the application for landing is made.

(8) [Revoked SOR/93-144.]

(9) The fee payable by an entrepreneur, an investor or a self-employed person for the processing of an application for landing for each dependant shall be

- (a) the fee prescribed in paragraph 2(b) of the schedule, in the case of a dependant who is not a spouse and who is under 19 years of age; and
- (b) the fee prescribed in paragraph 2(c) of the schedule, in the case of a dependant who is a spouse or who is 19 years of age or older.

#### **Fees for Applications for Ministerial Exemptions**

3.1. (1) The fee prescribed in paragraph 1(b) of the schedule is payable, at the time an application is made, by a person who makes an application under section 2.1 of the *Immigration Regulations, 1978*.

(2) The fee payable by each dependant or by a person referred to in subsection (1) in respect of each dependant, for the processing of an application made under section 2.1 of the *Immigration Regulations, 1978* is

- (a) the fee prescribed in paragraph 1(c) of the schedule, in the case of a dependant who is not a spouse and who is under 19 years of age; and
- (b) the fee prescribed in paragraph 1(d) of the schedule, in the case of a dependant who is a spouse or who is 19 years of age or older.

#### **Fee for Processing Application for Employment Authorization**

4. (1) The fee prescribed in paragraph 3(a) of the schedule is payable, at the time an application for an employment authorization is made, by

- (a) a person whom the Refugee Division has determined to be a Convention refugee;



- (b) a person whom a visa officer has determined to be a Convention refugee seeking resettlement;
- (c) a person in Canada who has made a claim to be a Convention refugee that has not yet been decided by the Refugee Division;
- (d) a dependant of a person referred to in paragraph (a), (b) or (c);
- (e) a person referred to in paragraph 20(5)(c) or (d), subparagraph 20(5)(e)(ii) or paragraph 20(5)(f) of the *Immigration Regulations, 1978*;
- (f) a dependant of a person referred to in paragraph 19(1)(a), (b) or (r) of the *Immigration Regulations, 1978*, where the dependant is referred to in subparagraph 20(5)(e)(iii) of those Regulations;
- (g) a person in or coming to Canada pursuant to an agreement between Canada and a foreign country or an arrangement entered into with a foreign country by the Government of Canada or by or on behalf of one of the provinces providing for reciprocal employment opportunities of an article, cultural or educational nature;
- (h) a participant in an international student or young workers reciprocal employment program;
- (i) a citizen of a country with which Canada has entered into an agreement whereby neither country is to charge for the processing of an application for authorization to engage or continue in employment; or
- (j) an officer of the United States Immigration and Naturalization Service or of the United States Customs carrying out pre-inspection duties, an American member of the International Joint Commission, a United States grain inspector or any other United States Government official in possession of an official United States Government passport and assigned to a temporary posting in Canada.

(2) The fee prescribed in paragraph 3(b) of the schedule is payable, at the time an application for an employment authorization is made, by an applicant who is a person other than a person described in subsection (1) and who is not a member of a group of performing artists described in subsection (3).

(3) The fee prescribed in paragraph 3(c) of the schedule is payable where two or more members of a group of fewer than 15 persons, which group consists of one or more performing artists and the staff of that artist or those artists, apply at the same time and the same place for an employment authorization and that fee covers the processing of all of the applications.

#### Fee for Processing Application for Extension of Authorization to Remain in Canada

5. (1) The fee prescribed in paragraph 4(a) of the schedule is payable, at the time an application is made, by a person who applies to extend the period of time during which the person is authorized to remain in Canada and who is

(a) a person who at the same time applies for an employment authorization or a student authorization;

(a.1) a person in Canada who has made a claim to be a Convention refugee that has not yet been decided by the Refugee Division;

(b) a person whom the Refugee Division has determined to be a Convention refugee;

(c) a person whom a visa officer has determined to be a Convention refugee seeking resettlement;

(d) a person who is referred to in paragraph 19(1)(a), (b), (c) or (r) of the *Immigration Regulations, 1978*, or a dependant of such a person;

(e) a dependant of

(i) a person described in paragraph 4(1)(e), (g) or (h),

(ii) a participant in a program sponsored by the Canadian International Development Agency, or

(iii) a recipient of a Government of Canada scholarship or fellowship; or

(f) a citizen of a country with which Canada has entered into an agreement whereby neither country is to charge for the processing of an application for extension of status.

(2) The fee prescribed in paragraph 4(b) of the schedule is payable, at the time an application is made, by a person other than a person described in subsection (1) who applies to extend the period of time during which the person is authorized to remain in Canada.

#### Fees for Processing Applications for a Visitor Visa

6. (1) The fee prescribed in paragraph 5(a) of the schedule is payable, at the time an application is made for a visitor visa to Canada, by

(a) a person who is referred to in paragraph 19(1)(a) of the *Immigration Regulations, 1978* and the dependants of such a person;

(b) armed forces personnel on official duty and their dependants;

(c) a clergyman, a member of a religious order or a lay person to assist a congregation or group in the achievement of its spiritual goals where the duties to be performed by that person are to consist mainly of preaching doctrine, presiding at liturgical functions or spiritual counselling, and their dependants;

(d) [Revoked SOR/94-389, s. 7(2).];

(e) persons seeking to come into Canada, other than members of a group of performing artists and the staff of those artists, who apply at the same time and at the same place, for a student authorization or an employment authorization;

(f) the following persons attending meetings in Canada;

- (i) participants attending meetings hosted by organizations of the United Nations or by the Government of Canada,
  - (ii) OAS representatives or participants attending meetings hosted by the Organization of American States (OAS), and
  - (iii) representatives of the Caribbean Development Bank;
- (g) persons travelling by transportation company vehicles to destinations other than Canada, who transit through or stopover in Canada for vehicle refuelling, or for the continuation of their journey with another transportation company vehicle, where the duration of their stay does not exceed 48 hours;
- (h) persons who are travelling to Canada from the United States, as part of an organized tour operated by a transportation company or a travel agency and who will return to the United States as part of the tour, where the duration of their stay does not exceed 48 hours; or
- (i) up to three members of a group of more than two but fewer than fifteen persons, which group consists of one or more performing artists and the staff of that artist or those artists, who apply at the same time and place for an employment authorization.

(2) Subject to subsection (4), the fee prescribed in paragraph 5(b) of the schedule is payable, at the time an application is made for a visitor visa to come into Canada once, by a person other than a person described in subsection (1).

(3) The fee prescribed in paragraph 5(c) of the schedule is payable, at the time an application is made for a visitor visa to come into Canada more than once, by a person other than a person described in subsection (1).

(4) The fee prescribed in paragraph 5(d) of the schedule is payable, at the time an application is made in the form of a collective certificate for a visitor visa to come into Canada once, by each member of the group of five or more members who have the same itinerary and who apply at the same time and place.

#### **Fee for Processing Requests for Discretionary Entry**

7. (1) The fee prescribed in paragraph 6(a) of the schedule is payable by a person to whom subsection 6(1) applies and who has been granted discretionary entry solely on the grounds that the person is not in possession of a visitor visa.

(2) Subject to subsection (3), the fee prescribed in paragraph 6(b) of the schedule is payable, at the time a request for discretionary entry is made under subsection 19(3) of the Act, by a person other than a person described in subsection (1).

(3) The fee prescribed in paragraph 6(c) of the schedule is payable where



two or more members of a group of fewer than 15 persons, which group consists of one or more performing artists and the staff of that artist or those artists, request at the same time and place discretionary entry under subsection 19(3) of the Act, and that fee covers the processing of all of the requests.

#### **Fee for Processing Requests for Minister's Permit and Minister's Permit Extension**

8. (1) The fee prescribed in paragraph 7(a) of the schedule is payable, at the time a request for a Minister's permit or an extension of a Minister's permit is made, by

- (a) a person described in subsection 4(1), 5(1) or 9(1); and
- (b) a permanent resident applicant and any accompanying dependants granted early admission.

(2) The fee prescribed in paragraph 7(b) of the schedule is payable, at the time an application for a Minister's permit or for an extension of a Minister's permit is made, by a person other than a person described in subsection (1) and who is not a member of a group of performing artists described in subsection (3).

(3) The fee prescribed in paragraph 7(c) of the schedule is payable where two or more members of a group of fewer than 15 persons, which group consists of one or more performing artists and the staff of that artist or those artists, request at the same time and place a Minister's permit or an extension of a Minister's permit, and that fee covers the processing of all of the requests.

#### **Fee for Processing Application for Student Authorization**

9. (1) The fee prescribed in paragraph 8(a) of the schedule is payable at the time an application for a student authorization is made by

- (a) a person described in paragraph 4(1)(a), (b), (c) or (d);
- (b) a member of a class of persons designated by the Governor in Council and that member's dependants;
- (c) [Repealed SOR/94-389, s. 8.];
- (d) a person who is referred to in paragraph 19(1)(a) of the *Immigration Regulations, 1978* and the dependants of such a person;
- (e) a dependant, studying at the secondary school level or lower, of a person who is employed by a charitable institution or as a clergyman, a member of a religious order or a lay person to assist a congregation or a group in the achievement of its spiritual goals, where the duties to be performed by that person consist mainly of preaching doctrine, presiding at liturgical functions or spiritual counselling;
- (f) a student who is seeking renewal of the student's authorizations and who

has become temporarily destitute through circumstances totally beyond the student's control or the control of any person on whom the student is dependant for financial resources;

(g) a member of a visiting force within the meaning of section 2 of the *Visiting Forces Act*, and the dependants of that member; and

(h) a person who is in Canada or who is coming into Canada, under an agreement between Canada and a foreign country or an arrangement entered into with a foreign country by the Government of Canada that provides for reciprocal educational opportunities.

(2) The fee prescribed in paragraph 8(b) of the schedule is payable, at the time an application for a student authorization is made, by an applicant who is a person other than a person described in subsection (1).

#### **Fee for Certification of Record of Landing**

10. (1) The fee prescribed in paragraph 9(a) of the schedule is payable, at the time an application to have a record of landing certified is made, by

(a) a federal, provincial or municipal government agency; and

(b) a person in receipt of welfare or in receipt of assistance under the Adjustment Assistance Program.

(2) The fee prescribed in paragraph 9(b) of the schedule is payable, at the time an application to have a record of landing certified is made, by an applicant who is a person other than a person described in subsection (1).

#### **Fee for Processing Replacement of Immigration Document**

11. The fee prescribed in section 10 of the schedule is payable by the applicant at the time an application is made for the replacement of an Immigration document.

#### **Fee for Processing Application for Returning Resident Permit**

12. The fee prescribed in section 11 of the schedule is payable by the applicant at the time an application is made for a returning resident permit.

#### **Fee for Investment Proposal Assessment**

13. (1) The fee prescribed in paragraph 12(a) of the schedule is payable by a proponent at the time an application is made for the assesment of an investment proposal.

(2) The fee prescribed in paragraph 12(b) of the schedule is payable by a

proponent at the time an application is made for an amendment to an investment proposal that has already been assessed.

**Fee for Immigration Services After Normal Business Hours at  
Ports of Entry**

14. Where a person who is seeking to come into Canada is required to appear before an immigration officer after normal business hours to undergo a secondary examination, the fee prescribed in section 13 of the schedule is payable by

- (a) the person who requests that the examination take place after normal business hours; or
- (b) a transportation company where one of the company's vehicles carrying the person arrives, unscheduled, at a port of entry after normal business hours.

**Fee for Processing Request for Authorization to Return to Canada**

15. The fee prescribed in section 14 of the schedule is payable by the applicant at the time an application is made to the Minister for authorization to return to Canada pursuant to section 55 of the Act.

**Fee for Processing Request in Respect of Criminal Rehabilitation**

16. (1) The fee prescribed in section 15(a) of the schedule is payable by a person described in paragraph 19(2)(a.1) of the Act, at the time an application is made to the Minister on the grounds of the person's having been rehabilitated.

(2) The fee prescribed in paragraph 15(b) of the schedule is payable by a person described in paragraph 19(1)(c.1) of the Act, at the time an application is made to the Governor in Council on the grounds of the person's having been rehabilitated.

**Fee for Processing Request for Transcript of an Immigration Inquiry or a  
Hearing at which an Adjudicator Presides**

17. The fee prescribed in section 16 of the schedule is payable by the applicant at the time an application is made for a transcript of the applicant's immigration inquiry or hearing at which an Adjudicator presides.

**Fee for Processing Governor in Council Requests**

18. The fee prescribed in section 17 of the schedule is payable by a person who has resided continuously in Canada for at least five years under the



authority of a permit issued by the Minister under the Act and in respect of whom an immigration officer has decided to proceed with a recommendation to the Governor in Council that landing be authorized pursuant to subsection 38(1) of the Act.

#### **Fee for Reviewing an Offer of Employment in a Family Business Application**

19. The fee prescribed in section 18 of the schedule is payable at the time a sponsor submits a Family Business Application requesting a review of an offer of employment made to a member of the family class or to an assisted relative.

#### **Fee for Processing Request for File Transfer**

20. The fee prescribed in section 19 of the schedule is payable by an applicant at the time the applicant makes a request for the transfer of the applicant's immigration file from one point of service to another point of service.

#### **Fee for Processing Request for Immigration Data**

21. (1) The fee prescribed in paragraph 20(a) of the schedule is payable by an employee of the Secretary of State (known as the Department of Citizenship and Immigration) who requests immigration statistical data that have not been published by the Department, at the time the request is made.

(2) The fee prescribed in paragraph 20(b) of the schedule is payable by a person who requests immigration statistical data that have not been published by the Secretary of State (known as the Department of Citizenship and Immigration), at the time the request is made.

#### **Combination of Documents — Maximum Rate**

22. The fee prescribed in section 21 of the schedule is the maximum fee, payable at the time a request is made by a person, or by a person and that person's dependants, who apply at the same time and at the same place, for any combination of the documents described in sections 4, 5, 6, 8 and 9.

#### **Fee for Processing an Application for a Document Establishing that a Person is a Permanent Resident**

23. The fee prescribed in section 22 of the schedule is payable by a person, at the time an application is made by the person for a document that establishes that the person is a permanent resident.

**Fee for Processing Requests for Re-instatement of Visitor Status**

24. (1) The fee prescribed in paragraph 23(a) of the schedule is payable by a person referred to in paragraph 19(1)(a) or (b) of the *Immigration Regulations, 1978* who has ceased to be a visitor by reason of any of paragraphs 26(1)(a) to (c) of the Act, at the time the person requests the Deputy Minister to authorize the person to remain in Canada as a visitor pursuant to subsection 27(2.1) of the Act.

(2) The fee prescribed in paragraph 23(b) of the schedule is payable by a person, other than a person described in subsection (1), who has ceased to be a visitor by reason of any of paragraphs 26(1)(a) to (c) of the Act, at the time the person requests the Deputy Minister to authorize the person to remain in Canada as a visitor pursuant to subsection 27(2.1) of the Act.

**Fee for Processing Applications for Alternate Manners of Examination**

25. (1) The fee prescribed in paragraph 24(a) of the schedule is payable, at the time an application is made for an alternate manner of examination in a manner approved by the Minister, by a person who is a member of a class referred to in section 12.2 of the *Immigration Regulations, 1978*.

(2) The fee prescribed in paragraph 24(b) of the schedule is payable by a spouse or dependant son or daughter of an applicant referred to in subsection (1), who applies at the same time and at the same place as the applicant for an alternate manner of examination approved by the Minister.

**SCHEDULE**

(Sections 3 to 25)

**FEES RELATING TO IMMIGRATION SERVICES****1. Application for landing or for a ministerial exemption**

- (a) \$0
- (b) \$500
- (c) \$100
- (d) \$500

**2. Application for landing by an entrepreneur, an investor, or a self-employed person**

- (a) \$825
- (b) \$100
- (c) \$500

3. Application for employment authorization
  - (a) \$0
  - (b) \$125
  - (c) \$250 (per group)
4. Application for an extension of an authorization to remain in Canada
  - (a) \$0
  - (b) \$65
5. Application for visitor's visa
  - (a) \$0
  - (b) to come into Canada once, \$55 (per individual)
  - (c) to come into Canada more than once, \$85 (per individual)
  - (d) to come into Canada once, \$45 (per member)
6. Request for discretionary entry pursuant to subsection 19(3) of the Act
  - (a) \$0
  - (b) \$125
  - (c) \$250
  - (d) [Revoked SOR/93-144.]
7. Request for Minister's Permit or for extension of Minister's Permit
  - (a) \$0
  - (b) \$175
  - (c) \$350 (per group)
8. Application for student authorization
  - (a) \$0
  - (b) \$125
9. Application for certification of record of landing
  - (a) \$0
  - (b) \$30
  - (c) \$50 (per family)
10. Application for replacement of immigration document ..... \$30
11. Application for returning permanent resident permit ..... \$85
12. Application for assessment or amendment of investment proposal
  - (a) for assessment ..... \$6,000
  - (b) for amendment ..... \$1,650
13. Callout/Overtime  
\$125 for the first four hours and \$30 for each additional hour or part thereof
14. Application for authorization to return to Canada pursuant to section 55 of the Act ..... \$380



<b>15. Application on the grounds of criminal rehabilitation, pursuant to section 19 of the Act, requiring</b>	
(a) Ministers approval . . . . .	<b>\$380</b>
(b) Governor in Council approval . . . . .	<b>\$650</b>
<b>16. Application for transcript of an immigration inquiry or hearing at which an Adjudicator presides . . . . .</b>	<b>\$85</b>
<b>17. Governor in Council Requests . . . . .</b>	<b>\$275</b>
<b>18. Review of an offer of employment in a family business . . . . .</b>	<b>\$275</b>
<b>19. Request for transfer of a file . . . . .</b>	<b>\$55</b>
<b>20. Request for immigration statistical data that were not published by the Secretary of State (known as the Department of Citizenship and Immigration)</b>	
(a) \$0	
(b) for use of the central processor unit to respond to each request	
(i) \$30 for the first 5 minutes or less, and	
(ii) \$30 per minute for each additional minute or less.	
<b>21. Maximum rate — combination of documents . . . . .</b>	<b>\$350</b>
<b>22. Application for a document establishing permanent residence . . . . .</b>	<b>\$45</b>
<b>23. Request for re-instatement of visitor status</b>	
(a) \$0	
(b) \$125	
<b>24. Application for alternate manner of examination</b>	
(a) \$25 per application	
(b) \$10 per application	

# **Immigration Appeal Division Rules**

## **SOR/93-46**

**RULES GOVERNING THE ACTIVITIES OF, AND THE PRACTICE AND PROCEDURE IN, THE APPEAL DIVISION OF THE IMMIGRATION AND REFUGEE BOARD**

### **Short Title**

1. These rules may be cited as the *Immigration Appeal Division Rules*.

### **Interpretation**

2. In these Rules,

“Act” means the *Immigration Act*;

“Assistant Deputy Chairman” means an Assistant Deputy Chairperson (Immigration Appeal Division);

“counsel” means a person who represents a party in any proceeding before the Appeal Division;

“notice to appear” means a notice to appear referred to in rule 14;

“presiding member” means the member designated pursuant to rule 5;

“registrar” means a person designated pursuant to rule 4;

“registry” means an office established by the Board pursuant to rule 3.

### **Registry and Registrar**

3. The Board shall establish one or more offices for the activities of the Appeal Division, each of which is to be known as a registry.

4. The Board shall designate a person to be registrar at each registry.

### **Presiding member**

5. An Assistant Deputy Chairperson may designate a member to act as presiding member in respect of a hearing of an appeal or an application, that, by the Act, must be brought before the Appeal Division.

### **Appeals from Removal Orders or Conditional Removal Orders**

6. (1) Subject to subrule (2), a person who is appealing a removal order

or conditional removal order pursuant to section 70 of the Act shall, within 30 days after the day on which the order was served on the person,

(a) where the order was made by an adjudicator, file a notice of appeal, together with a copy of the order, at the registry;

(b) where the order was made by a senior immigration officer, serve a notice of appeal, together with a copy of the order on a senior immigration officer.

(2) The time limit for filing a notice of appeal of a conditional removal order by a person described in paragraph 70(2)(a) of the Act is 30 days after the person receives notice that the conditional removal order has been confirmed under paragraph 46.07(3)(a) of the Act.

(3) Where a senior immigration officer is served with a notice of appeal pursuant to subrule (1), that officer shall file it forthwith at the registry that is designated by the Appeal Division.

7. As soon as is practicable after a notice of appeal has been filed pursuant to rule 6,

(a) an adjudicator shall serve the parties with a certified true copy of a record that consists of

(i) a certified true copy of the order and the notice of confirmation referred to in subrule 6(2), if any,

(ii) a transcript of the proceedings at the inquiry held pursuant to the Act,

(iii) a certified true copy of all documentary evidence filed at the inquiry,

(iv) any reasons given by the adjudicator for the decision, and

(v) a table of contents;

(b) a senior immigration officer shall serve the appellant with a certified true copy of the record that consists of

(i) a certified true copy of the order,

(ii) a copy of any report and direction or any statement of arrest in respect of the appellant,

(iii) any reasons given by the senior immigration officer for the decision,

(iv) any other relevant information, and

(v) a table of contents; and

(c) a senior immigration officer shall file three certified true copies of the record referred to in paragraph (b) at the registry.

#### Appeals by the Minister

8. Where the Minister appeals a decision pursuant to section 71 of the Act, the notice of appeal shall



- (a) be served on the respondent within 30 days after the decision is made;
- (b) be filed at the registry within five days after the service of the notice; and
- (c) set out concisely every ground of appeal on which the Minister relies.

9. As soon as is practicable after a notice of appeal has been filed pursuant to paragraph 8(b), an adjudicator shall serve the parties with a certified true copy of a record that consists of

- (a) the decision rendered by the adjudicator;
- (b) a transcript of the proceedings at the inquiry held pursuant to the Act;
- (c) a certified true copy of all documentary evidence filed at the inquiry;
- (d) any reasons given by the adjudicator for the decision; and
- (e) a table of contents.

### Appeals by Sponsors

10. A sponsor who is appealing a refusal to approve an application for landing pursuant to section 77 of the Act shall serve a notice of appeal on an immigration officer within 30 days after the day on which the sponsor has been informed of the reasons for the refusal.

11. (1) Where an immigration officer is served with a notice of appeal pursuant to rule 10, that officer shall forthwith file it at the registry that is designated by the Appeal Division.

(2) As soon as is practicable after a notice of appeal has been filed pursuant to subrule (1), an immigration officer shall serve the appellant with a certified true copy of the record described in subrule (3) and file three certified true copies thereof at the registry.

(3) The record shall consist of

- (a) a certified true copy of the application for landing;
- (b) a certified true copy of the application by the sponsor in support of the application for landing;
- (c) certified true copies of all other documents filed by the sponsor and the person being sponsored in support of the application for landing;
- (d) a statutory declaration by the immigration officer or visa officer stating all evidence relating to the application for landing and the sponsorship thereof considered by the officer, together with a statement of the reasons for refusing to approve the application for landing;
- (e) a certified true copy of the notice of refusal to approve the application for landing furnished to the sponsor;
- (f) a certified true copy of the notice of refusal to approve the application for landing furnished to the person being sponsored; and
- (g) a table of contents.

### Change of Venue

12. (1) A party may apply in accordance with rule 26 to the Appeal Division to have a conference or hearing held at a place other than that set out in the notice to appear.

(2) An application made under subrule (1) shall be accompanied by a statement of facts to support the application.

(3) The Appeal Division shall grant an application made under subrule (1) if it is satisfied that doing so will not adversely affect the proper operation of the Appeal Division, will provide for a full and proper hearing and will dispose expeditiously of the appeal or application at issue.

(4) Where an application made under subrule (1) is granted, the file relating to the appeal or application shall be transferred to the registry of the place where the conference or hearing is to be held.

### Postponements and Adjournments

13. (1) Before the commencement of a hearing, a party may apply in accordance with rule 26 to the Appeal Division to have the hearing postponed.

(2) Before the resumption of a hearing, a party may apply in accordance with rule 26 to the Appeal Division to have the hearing adjourned.

(3) A party whose application for a postponement or adjournment was denied may reapply orally at the commencement or resumption of the hearing.

(4) The Appeal Division, in determining whether a hearing shall be postponed or adjourned, may take into consideration, where applicable,

- (a) whether the postponement or adjournment would unreasonably impede the proceedings;
- (b) the efforts made by the parties to proceed expeditiously;
- (c) the nature and complexity of the issues relevant to the proceedings;
- (d) the nature of the evidence to be presented, and the likelihood of causing an injustice to any party by proceeding in the absence of that evidence;
- (e) counsel's knowledge of, and experience with, similar proceedings;
- (f) the amount of time already afforded the parties for preparation of the case;
- (g) the efforts made by the parties to be present at the hearing;
- (h) the efforts made by the parties to make an application for a postponement or adjournment of the hearing at the earliest opportunity;
- (i) the number of, and reasons for, any previous postponements or adjournments granted;
- (j) whether the hearing was set peremptorily; and
- (k) any other relevant facts.

### Notice to Appear

14. (1) Where the Appeal Division directs a party to appear before it at a conference hearing, the Appeal Division shall, in a notice to appear, set out

- (a) the date, time and place set for the conference or hearing;
- (b) the purpose of the conference or hearing;
- (c) the right of any party to be represented by counsel at the party's own expense; and
- (d) in the case of an appeal by a person against whom a removal order or conditional removal order has been made, that, if the appellant fails to communicate with the Appeal Division or fails to inform the Appeal Division of the person's most recent address, the Appeal Division may declare the appeal to be abandoned.

(2) Subject to subrule (4), the registrar shall serve the notice to appear referred to in subrule (1) on every party at least 20 days before the date set for the conference or hearing.

(3) Any party to the proceeding may consent to the conference or hearing being held before the date referred to in subrule (1).

(4) A notice to appear given orally by telephone is valid notice for the purposes of subrule (1), if the parties are served with a written notice to appear at least eight days before the date set for the conference or hearing.

### Official Languages

15. At least 15 days before the date set for a conference or hearing, as the case may be, a party, other than the Minister, shall notify the Appeal Division, in writing, of the official language in which the party chooses the conference or hearing to be conducted.

### Interpreter

16. (1) The Appeal Division shall provide an interpreter to assist a party or a party's witness where the party advises the Appeal Division in writing, at least 15 days before the date set for a conference or hearing, as the case may be, that the party or witness does not understand or speak the language in which the proceeding is to be conducted, or is hearing impaired.

(2) The interpreter shall take an oath or make a solemn affirmation to interpret accurately any statements made, and to translate accurately any documents that the Appeal Division may require to be translated, in the course of the conference or hearing.



*Varaich v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 143.

A tribunal is under a clear duty to make an inquiry into an interpreter's competence once an objection is made. Being the master of his or her proceeding, the adjudicator may call a witness if it is necessary to determine the competence of the interpreter and ensure a fair hearing, but this is not obligatory. The adjudicator did not rely on the interpreter's reputation, but asked the applicant directly what she did not understand. Further, the adjudicator engaged in a relatively lengthy questioning of the interpreter as to his qualifications before concluding that he was competent. Therefore, the applicant did not establish that her right to an interpreter was infringed.

*Yu v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 241.

The applicant complained about the quality of the interpretation of her testimony and filed in support an affidavit commenting on the accuracy of the translation. The Court could not give effect to the general statements about the quality of interpretation due to the fact that the affidavit lacked sufficient specific examples. However, the decision was set aside because the one example of inaccuracy that was referred to formed the basis for the finding that the applicant's testimony was exaggerated. The Court could not be certain that the Board would have concluded that the fear of persecution was exaggerated had there been a proper interpretation of this evidence. Accordingly, the decision of the Refugee Division was quashed.

### Conferences

**17. (1) The Appeal Division may direct the parties, by a notice to appear, to attend a conference, that is to be held before or during a hearing, on any matter related to an appeal or application in order to provide for a full and proper hearing and to dispose of the appeal or application expeditiously.**

**(2) At the conference the participants shall**

**(a) exchange the names and addresses of witnesses that they intend to call, copies of any document that they intend to produce and of any statement of the facts, information and opinions of which they are in possession and that they intend to produce as evidence at the hearing; and**

**(b) attempt to agree on means of simplifying the hearing and, as far as possible, define any pertinent issues, agree upon certain facts and receive documents.**

**(3) Any agreement concluded at a conference shall be in writing and signed by the participants or given orally at the hearing and shall govern the hearing to the extent that the Appeal Division considers appropriate in order to provide for a full and proper hearing and to dispose of the appeal or application expeditiously.**

**(4) Forthwith after a conference, a member or, where a member is not present at the conference, a party, shall file at the registry any written agreement**

concluded and the original of any documents that have been received during the conference.

### Disclosure

18. (1) Any party shall, in any proceeding, serve on the other party, at least 20 days before the date set for a hearing, a copy of all information, documents, statements and written arguments that the party intends to produce at the hearing, unless the information, documents, statements and written arguments were produced at a conference held in accordance with rule 17.

(2) For the purposes of subrule (1), where any information and documents are available to the public, a party may serve, instead of a copy thereof, a written notice that sets out the appropriate titles of, and references for, the information and documents and where they can be obtained.

(3) A party who intends to reply, at a hearing, to the evidence referred to in subrule (1) shall, at least 10 days before the date set for the hearing, serve on the other party a copy of the reply.

19. A party who intends to call an expert witness at a hearing shall, at least 20 days before the date set for the hearing, serve on the other party a report signed by the expert witness, setting out the name, address and qualifications of the expert witness and a brief summary of the substance of the proposed testimony of the expert witness.

### Applications for Confidentiality

20. An application made pursuant to subsection 80(2) of the Act shall be made to the Appeal Division by motion in accordance with subrules 27(2) to (7).

### Witnesses

21. A party who calls a witness shall pay the witness the applicable fees and allowances set out in the *Federal Court Rules*.

22. (1) The Appeal Division may, at the request of a party or of its own motion, exclude witnesses from a hearing until they are called to testify.

(2) No person may communicate to a witness who has been excluded pursuant to subrule (1) any evidence or testimony that is given during the course of a hearing until after the witness has testified.

23. (1) A party who makes an application to summon a witness shall do so in writing and shall file it at the registry.

(2) Where a person avoids service of a summons or fails to comply with a summons, the party who applied for the issuance of the summons may make

an application in writing, accompanied by an affidavit setting out the facts on which the application is based, to the Appeal Division for a warrant and shall file the application at the registry.

(3) An application made under subrule (2) shall contain information to establish that

(a) the person named in the summons

(i) avoided service of the summons, or

(ii) was served with the summons and was paid or offered a reasonable amount of attendance money but failed to comply with the requirements of the summons; and

(b) the appearance of the person named in the summons is necessary to ensure a full and proper hearing.

(4) A warrant issued on an application made under subrule (2) that directs a peace officer to cause the person named therein to be apprehended anywhere in Canada shall indicate the measures to be taken by the peace officer in respect of the detention or release of the person.

(5) The measures referred to in subrule (4) may include

(a) detaining the person in custody and forthwith bringing the person before the Appeal Division; and

(b) releasing the person on a recognizance, with or without sureties, conditional on the person's appearance at the date, time and place specified, to give or produce evidence at a hearing before the Appeal Division.

#### Party in Custody

24. Where a party is detained, the Appeal Division may order the person who detains the party to bring the latter in custody to a conference or hearing held in respect of the party.

#### Hearings

25. The Appeal Division may permit evidence to be adduced at a hearing in such manner as would provide for a full and proper hearing and to dispose of the appeal or application expeditiously, including

(a) the filing of affidavits and other documentary evidence;

(b) the presentation of written or oral arguments or both;

(c) the calling, questioning and cross-examination of witnesses; and

(d) the testimony of any party.



*Kusi v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 281, 65 F.T.R. 58.

An adjudicator and member of the Immigration and Refugee Board were conducting a credible basis hearing into the claim of a Convention refugee claimant, pursuant to provisions of the Immigration Act in effect on August 19, 1992.

The tribunal accepted as evidence notes taken by an immigration officer, which recorded answers given to him at the port of entry by the applicant. The applicant contested the accuracy of the notes and asked that the officer be produced for cross-examination, a request which was denied by the tribunal.

The decision by the tribunal that there was no credible basis to the applicant's claim was set aside and the matter was remitted back for determination in accordance with the law. Specifically, the Court found that given the importance of the interest, namely the applicant's claim to be a Convention refugee, and given the fact that the applicant contested the accuracy of the notes which were relied upon by the tribunal, the rules of natural justice and of fundamental justice required that the cross-examination, which was sought, be allowed. The Court relied on the jurisprudence in *Canada (Min. of Employment & Immigration) v. Leal* (1991), 129 N.R. 383 (Fed. C.A.) and *Cheung v. Canada (Min. of Employment & Immigration)* (1981), 122 D.L.R. (3d) 41.

*Editor's Note:* Although occurring in the context of a repealed refugee hearing procedure, the principle in this case may have a broader application.

### Applications

**26. (1) Subject to subrule (2), an application that is referred to in rules 12, 13, 38 or 40 shall be**

- (a) made by a party in writing;**
- (b) filed at the registry; and**
- (c) served on the other party.**

**(2) A party may make any application that is provided for in these Rules orally at a hearing where the members are satisfied that no injustice is likely to be caused to any party thereby.**

**(3) The Appeal Division may determine an application when it is satisfied that all parties have been given a reasonable opportunity to make representations.**

### Motions

**27. (1) Every application that is not provided for in these Rules shall be made by a party to the Appeal Division by motion, unless, where the application is made during a hearing, the members decide that, in the interests of justice, the application should be dealt with in some other manner.**

**(2) The motion shall consist of**

- (a) a notice specifying the grounds on which the motion is made;**

- (b) an affidavit setting out the facts on which the motion is based; and
- (c) a concise statement of the law and of the arguments that are relied on by the applicant.

(3) The motion shall be

- (a) served on the other party to the proceeding; and
- (b) filed in three copies at the registry within five days after the date of service.

(4) Evidence on the merits of a motion shall be introduced by affidavit, unless the Appeal Division decides that, in the interests of justice, the evidence should be introduced in some other manner.

(5) The other party may, within seven days after being served with a motion, file at the registry a reply stating concisely the law and arguments relied on by the party, accompanied by an affidavit setting out the facts on which the reply is based.

(6) The applicant may, within seven days after being served with a reply, file a response thereto at the registry.

(7) A copy of the reply and affidavit filed pursuant to subrule (5) and of the response filed pursuant to subrule (6) shall be served on the other party within seven days after the date of service of the motion or reply, as the case may be.

(8) The Appeal Division, on being satisfied that no injustice is likely to be caused, may dispose of a motion without a hearing.

### **Orders**

28. A registrar shall sign and seal all orders of the Appeal Division and shall forthwith serve all parties with certified true copies of all such orders.

29. A request made pursuant to subsection 69.4(5) of the Act for written reasons for the disposition of an appeal shall be made to the Appeal Division, in writing, and filed at the registry.

### **Withdrawal**

30. (1) A party may withdraw an appeal or an application either orally during a hearing or by notice in writing filed at the registry.

(2) The registrar shall forthwith notify in writing the other party of any withdrawal of an appeal or application.

### **Reinstatement**

31. (1) A party who has withdrawn an appeal or application may, by motion

made pursuant to subrules 27(2) to (7), apply to the Appeal Division for reinstatement of the appeal or application.

(2) The Appeal Division may grant the application for reinstatement of an appeal or application if it is satisfied that there are sufficient reasons why the appeal or application should be reinstated and that it is in the interests of justice to do so.

### **Reopening**

32. (1) Where the Appeal Division has declared an appeal to be abandoned by a party, the party may, by motion made pursuant to subrules 27(2) to (7), apply to the Appeal Division for the appeal to be reopened.

(2) The Appeal Division may grant the application for reopening of an appeal if it is satisfied that there are sufficient reasons why the appeal should be reopened and that it is in the interests of justice to do so.

### **Stay of Execution of a Removal Order or Conditional Removal Order**

33. (1) Where the Appeal Division disposes of an appeal in accordance with paragraph 73(1)(c) or (d) of the Act, a party may apply in writing to the Appeal Division to take one of the measures referred to in paragraphs 74(3)(a) and (b) of the Act.

(2) An application made pursuant to subrule (1) shall

(a) state the grounds thereof;

(b) be accompanied by

(i) an affidavit setting out the facts on which the application is based, and

(ii) a concise statement of the law and arguments that are relied on by the applicant;

(c) be served on the other party; and

(d) be filed at the registry, together with two copies thereof, within five days after the date of service on the other party.

(3) Where the Appeal Division reviews a case of its own motion pursuant to subsection 74(2) of the Act, the registrar shall notify the parties of the review 30 days before the date fixed for the review.

### **Return to Canada for Hearing of Appeal**

34. (1) Where a person described in section 75 of the Act informs the Appeal Division in writing of the person's desire to appear in person before the Appeal



Division at the hearing of the appeal, the registrar shall forthwith so notify the Minister.

(2) The Minister may, within five days after being notified, file a written submission respecting the return to Canada of the person referred to in subrule (1).

(3) The Appeal Division shall notify the person referred to in subrule (1) of any submission made by the Minister and shall afford the person a reasonable opportunity to respond in writing, unless the Appeal Division decides that no further submission of the person is required and that the person shall be allowed to return to Canada.

### Service and Filing

35. (1) Subject to subrule (5), service of any document in the course of any proceeding under these Rules shall be effected by personal service, by prepaid regular mail, by any mail service whereby the sender is provided with an acknowledgement of receipt, or by the telephone transmission of a facsimile of the document in accordance with subrule (3).

(2) A copy of any document served on a party pursuant to subrule (1) shall also be served on that party's counsel, if any.

(3) A document that is served by telephone transmission of a facsimile shall include a cover page setting out

- (a) the sender's name, address and telephone number;
- (b) the name of the addressee;
- (c) the total number of pages transmitted, including the cover page;
- (d) the telephone number from which the document is transmitted; and
- (e) the name and telephone number of a person to contact in the event of transmission problems.

(4) Service by prepaid regular mail shall be considered to be effected on the date that is seven days after the date of mailing.

(5) Where service cannot be effected in accordance with subrule (1), the Chairperson may direct that service be effected by such means as will, to the extent possible, provide a party with the document and as will not likely cause injustice to any party.

(6) After service of a document has been effected by a party, the party shall file proof of service thereof at the registry.

36. A party, other than the Minister, shall notify the Appeal Division forthwith in writing of the party's address and the name and address for service of the party's counsel, and any changes thereto.

37. (1) A document shall be filed at the registry by serving it on an employee of the registry at which the file relating to the appeal or application is held.

(2) The filing of a telephone transmission of a facsimile shall be considered to be effected on the date on which it is received by the registrar, as stamped on the facsimile.

(3) All documents submitted in the course of any proceeding under these Rules in a language other than English or French shall be accompanied by a translation in English or French that is certified to be correct, unless the Appeal Division decides that a translation is not necessary to provide for a full and proper hearing.

#### Time Limits

38. The Appeal Division may, on application by a party made in accordance with rule 26 either before or after a time limit set out in these Rules has expired, shorten or extend the time limit in order to provide for a full and proper hearing.

#### General

39. These Rules are not exhaustive and, where any matter that is not provided for in these Rules arises in the course of any proceeding, the Appeal Division may take whatever measures are necessary to provide for a full and proper hearing and to dispose of the matter expeditiously.

40. Where a party does not comply with a requirement of these Rules, the Appeal Division, on application made by the party in accordance with rule 26, may permit the party to remedy the non-compliance or may waive the requirement, where it is satisfied that no injustice is thereby likely to be caused to any party or the proceeding will not be unreasonably impeded.

# Convention Refugee Determination Division Rules

## SOR/93-45

### RULES GOVERNING THE ACTIVITIES OF, AND THE PRACTICE AND PROCEDURE IN, THE CONVENTION REFUGEE DETERMINATION DIVISION OF THE IMMIGRATION AND REFUGEE BOARD

#### Short Title

1. These Rules may be cited as the *Convention Refugee Determination Division Rules*.

#### Interpretation

2. In these Rules,

“Act” means the *Immigration Act*;

“Assistant Deputy Chairperson” means an Assistant Deputy Chairperson (Convention Refugee Determination Division);

“coordinating member” means a member designated by the Governor in Council pursuant to subsection 59(3) of the Act;

“counsel” means a person authorized pursuant to subsection 69(1) of the Act to represent a party in any proceeding before the Refugee Division;

“member” means a member of the Refugee Division;

“notice to appear” means a notice to appear referred to in rule 15;

“party” means the person concerned or, where the Minister takes part in a proceeding or makes an application, the Minister;

“person concerned” means a person whose claim is referred to the Refugee Division pursuant to section 46.02 or subsection 46.03(1) of the Act, or a person who is the subject of an application made under section 69.2 of the Act;

“refugee hearing officer” means a person referred to in section 68.1 of the Act;

“registrar” means a person designated pursuant to rule 4;

“registry” means an office established by the Board pursuant to rule 3.



### Registry and Registrar

3. The Board shall establish one or more offices for the activities of the Refugee Division, each of which is to be known as a registry.

4. The Board shall designate a person to be registrar at each registry.

### Presiding member

5. An Assistant Deputy Chairperson or coordinating member may designate a member to act as presiding member in respect of a hearing into a claim or an application that, by the Act, must be brought before the Refugee Division.

### Referral to the Refugee Division

6. (1) A senior immigration officer shall refer a claim to the Refugee Division pursuant to section 46.02 or subsection 46.03(1) of the Act, by:

(a) forwarding to the Refugee Division

(i) the determination of eligibility of the claim of the person concerned that is made by the senior immigration officer, and

(ii) a copy of any identification and travel documents of the person concerned that are in the possession of the senior immigration officer;

(b) forwarding to the Refugee Division the following information, in writing, namely,

(i) the section of the Act pursuant to which the claim is being referred,

(ii) the name, sex and date of birth of the person concerned,

(iii) if available, the address and telephone number in Canada of the person concerned,

(iv) the name of the counsel, if any, of the person concerned,

(v) the country or countries in which the person concerned fears persecution,

(vi) the official language chosen by the person concerned for communication with the Refugee Division,

(vii) where applicable, the language or dialect of the interpreter required by the person concerned during any proceeding,

(viii) where applicable, the place of detention of the person concerned,

(ix) an indication of whether or not any information had been requested by the Minister pursuant to subsection 69.1(2) of the Act,

(x) the Canada Employment and Immigration Commission Client I.D. Number relating to the claim,

(xi) where applicable, the names of the family members of the person concerned whose claims have been referred to the Refugee Division and the Canada Employment and Immigration Commission Client I.D. Number relating to those family members,

- (xii) the date on which, and the method by which, the senior immigration officer serves the person concerned with the information form in accordance with paragraph (c),
- (xiii) the date of the referral of the claim by the senior immigration officer to the Refugee Division, and
- (xiv) the name of the senior immigration officer; and

(c) serving the person concerned with the form that sets out the information to be provided to the Refugee Division pursuant to subrule 14(1).

(2) The senior immigration officer shall forward the documents and information referred to in paragraphs (1)(a) and (b) to the registry designated by the Refugee Division.

### Cessation and Vacation Applications

7. (1) An application for leave made by the Minister pursuant to subsection 69.2(3) of the Act shall

- (a) be made by way of notice in writing addressed to the Chairperson and filed at the registry from which the notice of decision in respect of the determination that a person is a Convention refugee was issued;
- (b) specify the grounds on which the application is made; and
- (c) include an affidavit that sets out the facts on which the application is based.

(2) The registrar shall serve a copy of the Chairperson's decision on the Minister.

(3) Where the Minister obtains leave to make an application pursuant to subsection 69.2(2) of the Act or where the Minister makes an application pursuant to subsection 69.2(1) of the Act, the application shall

- (a) be made by way of notice in writing addressed to the Refugee Division and filed at the registry from which the leave was granted or the notice of decision in respect of the determination that a person is a Convention refugee was issued, as the case may be;
- (b) specify the grounds on which the application is made; and
- (c) include an affidavit setting out the facts on which the application is based.

(4) Where the Minister makes an application referred to in subrule (3), the Minister shall serve on the person concerned a copy of that application and, where applicable, a copy of the decision referred to in subrule (2).

(5) When the requirements of subrules (3) and (4) have been met, the Refugee Division shall serve on the parties a notice to appear.

### Participation of the Minister

8. (1) Subject to subrule (2), where the Minister intends to participate at any hearing into a claim pursuant to section 69.1 of the Act, the Minister may, at any time, give notice in writing of the Minister's intention to participate.

(2) The period referred to in subsection 69.1(7.1) of the Act after which a member may determine that a person concerned is a Convention refugee without a hearing is

(a) where the Minister has requested information pursuant to subsection 69.1(2) of the Act, the 15-day period immediately after the day on which the Minister is served with the form that contains the information referred to in subrule 14(1); and

(b) where the Minister has not requested information pursuant to subsection 69.1(2) of the Act, the 28-day period immediately after the day on which the claim is referred to the Refugee Division by a senior immigration officer pursuant to rule 6.

(3) The Minister shall serve the notice referred to in subrule (1) on the person concerned and shall file the notice at the registry.

9. (1) Where the Minister informs the Refugee Division pursuant to subparagraph 69.1(5)(a)(ii) of the Act that the Minister is of the opinion that matters involving section E or F of Article 1 of the Convention or subsection 2(2) of the Act are raised by the claim, the Minister shall specify the grounds and the parts of section E or F or of subsection 2(2) that in the opinion of the Minister are relevant to the claim and shall set out briefly the law and facts on which the Minister relies.

(2) Where, before the commencement of a hearing, the refugee hearing officer or the Refugee Division is of the opinion that a claim before the Refugee Division might involve Section E or F of Article 1 of the Convention or subsection 2(2) of the Act, the refugee hearing officer shall forthwith notify the Minister and provide the Minister with such information as is necessary.

(3) Where, during a hearing, the refugee hearing officer or a member is of the opinion that a claim before the Refugee Division might involve section E or F of Article 1 of the Convention or subsection 2(2) of the Act, the refugee hearing officer or the member shall so inform the presiding member and, if the presiding member so directs, the refugee hearing officer shall forthwith notify the Minister and provide the Minister with such information as is necessary.

(4) The refugee hearing officer shall serve the person concerned forthwith with a copy of all written information that the refugee hearing officer provides to the Minister pursuant to subrules (2) and (3).



### Joinder

10. (1) An Assistant Deputy Chairperson or coordinating member may order that two or more claims or applications be processed jointly where the Assistant Deputy Chairperson or coordinating member believes that no injustice is thereby likely to be caused to any party.

(2) Subject to subsection (3), claims or applications of legal or *de facto*, dependant, father, mother, brothers or sisters of the person concerned shall be processed jointly.

(3) On application by a party, or on the members' own motion at the time of the hearing, the members may order that the claims or applications be heard separately, where the members believe that hearing the claims or applications jointly is likely to cause an injustice to any party.

### Designated Representatives

11. Where counsel of the person concerned believes that the person concerned is under 18 years of age or is unable to appreciate the nature of the proceeding, counsel shall so advise the Refugee Division forthwith in writing so that the Refugee Division may decide whether to designate a representative pursuant to subsection 69(4) of the Act.

### Change of Venue

12. (1) A party may apply in accordance with rule 27 to the Refugee Division to have a preliminary conference, conference or hearing held at a place other than that set out in the notice to appear.

(2) An application made under subrule (1) shall be accompanied by a statement of facts to support the application.

(3) The Refugee Division shall grant an application made under subrule (1) if it is satisfied that doing so will not adversely affect the proper operation of the Refugee Division, will provide for a full and proper hearing and will dispose expeditiously of the claim or application at issue.

(4) Where an application made under subrule (1) is granted, the file relating to the claim or application shall be transferred to the registry of the place where the conference or hearing is to be held.

### Postponements and Adjournments

13. (1) Before the commencement of a hearing, a party may apply in accordance with rule 27 to the Refugee Division to have the hearing postponed.

(2) Before the resumption of a hearing, a party may apply in accordance with rule 27 to the Refugee Division to have the hearing adjourned.

(3) A party whose application for a postponement or adjournment was denied may reapply orally at the commencement or resumption of the hearing.

(4) The Refugee Division, in determining whether a hearing shall be postponed, or in determining pursuant to subsection 69(6) of the Act whether an adjournment of a hearing would unreasonably impede the proceedings, may take into consideration, where applicable,

- (a) the efforts made by the parties to proceed expeditiously;
- (b) the nature and complexity of the issues relevant to the proceeding;
- (c) the nature of the evidence to be presented, and the likelihood of causing an injustice to any party by proceeding in the absence of the evidence;
- (d) counsel's knowledge of, and experience with, similar proceedings;
- (e) the amount of time already afforded the parties for preparation of the case;
- (f) the efforts made by the parties to be present at the hearing;
- (g) the efforts made by the parties to make an application for a postponement or adjournment of the hearing at the earliest opportunity;
- (h) the number of, and reasons for, any previous postponements or adjournments granted;
- (i) whether the hearing was set *peremptorily*; and
- (j) any other relevant facts.

#### Information Respecting Claim

14. (1) A person concerned shall provide the Refugee Division with information respecting the claim, including

- (a) the name, sex, marital status, date and place of birth, nationality or, where applicable, nationalities at birth, current nationality or, where applicable, nationalities, ethnic group or tribe and religion of the person concerned, and the country or, where applicable, countries in which the person concerned fears persecution;
- (b) the country or, where applicable, countries of residence of the person concerned in the last ten years and the status, if any, of the person concerned in each of those countries;
- (c) the name, date of birth, nationality or, where applicable, nationalities and whereabouts of the spouse, children, parents and brothers and sisters, if any, of the person concerned;
- (d) those identity and travel documents that were not given by the person concerned to a senior immigration officer;
- (e) where applicable, a statement to the effect that the person concerned has destroyed or disposed of identity documents that were in the person's possession, and the list of documents destroyed or disposed of and the reasons for the destruction or disposal;

- (f)** a detailed statement of the formal education or professional training and work history of the person concerned;
- (g)** where applicable, a statement to the effect that the person concerned has applied for a Canadian visa and the result of the application;
- (h)** a detailed statement of the route taken by the person concerned to Canada from the country or, where applicable, countries in which the person concerned fears persecution, including arrival and departure dates and method of transportation along that route;
- (i)** the date and place in Canada at which the person concerned first stated to a Canadian official the intention to claim Convention refugee status in Canada;
- (j)** the date, duration and purpose of any previous trips to Canada made by the person concerned;
- (k)** where applicable, a statement to the effect that the person concerned, since the date referred to in paragraph (i), has been in the country or countries in which the person concerned fears persecution;
- (l)** the type, document number, source of issue, date of issue and date of expiration of all documents used by the person concerned to travel to Canada, that were required to leave the country or countries in which the person concerned fears persecution, or were applied for by the person concerned after arrival in Canada for the purpose of travelling outside Canada, and, where applicable, an indication of any such documents that were not genuine or that were not issued in the name of the person concerned;
- (m)** where applicable, a statement to the effect that military or other service is compulsory in the country or countries in which the person concerned fears persecution, and details of the service, including draft age, length of service required and duration of actual service, dates of service, and whether the service was voluntary or due to conscription, and, where the person concerned did not serve or complete the service, the reasons why;
- (n)** where applicable, a statement to the effect that the person concerned is sought by the authorities in any country and the reasons therefor;
- (o)** the date and nature of any crime or offence committed by the person concerned;
- (p)** the date, place and disposition of any claim for Convention refugee status filed by the person concerned, or by any member of the family of the person concerned, in Canada, in another country or with the United Nations High Commissioner for Refugees;
- (q)** a statement of the grounds on which the claim of the person concerned is based;
- (r)** a statement of the facts on which the claim is based;
- (s)** the address and telephone number of the person concerned in Canada;
- (t)** the name, address and telephone number of counsel, if any, for the person concerned;
- (u)** where applicable, a statement to the effect that the person concerned



requires an interpreter for the purpose of participating in proceedings before the Refugee Division and the language or dialect required for interpretation;  
(v) the official language chosen by the person concerned for communication with the Refugee Division;

(w) a signed declaration by the person concerned that the information provided in accordance with this rule is true and correct to the best knowledge and belief of the person concerned;

(x) where the person concerned

(i) understands the language in which the information and documents referred to in this subrule are filed, a signed declaration by the person concerned that the person concerned fully understands the contents of the information and documentation, and

(ii) does not understand the language in which the information and documents referred to in this subrule are filed, a declaration of an interpreter stating that the information and documentation have been translated to the person; and

(y) any other relevant document.

(2) The information referred to in subsection (1) shall be

(a) provided on the form that was served on the person pursuant to paragraph 6(1)(c) or on a similar form; and

(b) filed

(i) in three copies, one being the original,

(ii) at the registry designated by the Refugee Division, and

(iii) within 28 days after the day on which the form is served on the person concerned pursuant to paragraph 6(1)(c), or within 35 days after that day where the information is filed by prepaid regular mail.

(3) In the case of a stateless person concerned, a reference in subrule (1) to the person's nationality shall be read as a reference to the person's country of former habitual residence.

### *Subsection (1)*

*Aquino v. Canada (Min. of Employment & Immigration)* (1992), 144 N.R. 315 (Fed. C.A.).

The appellant claimed to be a Convention refugee. The Convention Refugee Determination Division (CRDD) dismissed the appellant's claim and made adverse findings as to the appellant's credibility.

The appellant objected to the quality of the interpretation the interpreter provided during the hearing. The transcript indicated that the appellant had appeared to answer some questions without waiting for translation and the panel member interrupted the interpreter on several occasions to correct the translation. Further, the appellant's counsel

did not object to the interpretation during the hearing. Accordingly, this objection to the quality of the interpretation was not a ground upon which the appeal could succeed.

The PIF form was not identified on the record nor entered as an exhibit, although it was clearly on the table at the hearing and referred to in some of the questions. It was the perceived inconsistencies between the PIF and the appellant's testimony which formed a basis for the finding that the appellant was not credible. These inconsistencies were not put to the appellant at the hearing.

The PIF is a document required to be filed by every Convention refugee claimant. It is among the material an adjudicator is required to file with the registry of the CRDD when a claim is referred there. It is not a document which may be judicially noticed or which any legislative provision deems to be evidence in a proceeding before the Division. Accordingly, the PIF cannot in the present circumstances be found to be "evidence adduced in the proceedings" within section 68(3). Thus, the CRDD erred in law in basing findings of credibility on perceived discrepancies between the PIF, which was not in evidence, and the appellant's *viva voce* evidence. The decision of the CRDD was set aside and the matter remitted for rehearing by a differently constituted panel.

### Notice to Appear

**15. Where the Refugee Division directs a party to appear before it, the Refugee Division shall serve on that party a notice that sets out**

- (a) the date, time and place at which the party is to appear;**
- (b) the reason for which the party is to appear;**
- (c) the right of any party to be represented by counsel at the party's own expense;**
- (d) in the case of a claim referred to the Refugee Division, that where a person concerned fails to appear at the date, time and place specified, the Refugee Division may declare the claim to have been abandoned; and**
- (e) in the case of an application made pursuant to section 69.2 of the Act, that where the Minister fails to appear at the date, time and place specified, the Refugee Division may declare the application to have been abandoned.**

### Official Languages

**16. Where the person concerned wishes to have a conference or hearing conducted in the official language other than the language chosen by the person concerned pursuant to paragraph 14(1)(v), the person concerned shall so notify the Refugee Division, in writing, at least 15 days before the date set for the conference or hearing, as the case may be.**

### Interpreter

**17. (1) The Refugee Division shall provide an interpreter to assist a party or witness where the party or witness advises the Refugee Division in writing at least 15 days before the date set for a conference or hearing, as the case**

may be, that the party or witness does not understand or speak the language in which the conference or hearing is to be conducted, or is hearing impaired.

(2) The interpreter shall take an oath or make a solemn affirmation to interpret accurately any statements made, and to translate accurately any documents that the Refugee Division may require to be translated, in the course of the conference or hearing.

*Yu v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 241.

The applicant complained about the quality of the interpretation of her testimony and filed in support an affidavit commenting on the accuracy of the translation. The Court could not give effect to the general statements about the quality of interpretation due to the fact that the affidavit lacked sufficient specific examples. However, the decision was set aside because the one example of inaccuracy that was referred to formed the basis for the finding that the applicant's testimony was exaggerated. The Court could not be certain that the Board would have concluded that the fear of persecution was exaggerated had there been a proper interpretation of this evidence. Accordingly, the decision of the Refugee Division was quashed.

*Varaich v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 143.

A tribunal is under a clear duty to make an inquiry into an interpreter's competence once an objection is made. Being the master of his or her proceeding, the adjudicator may call a witness if it is necessary to determine the competence of the interpreter and ensure a fair hearing, but this is not obligatory. The adjudicator did not rely on the interpreter's reputation, but asked the applicant directly what she did not understand. Further, the adjudicator engaged in a relatively lengthy questioning of the interpreter as to his qualifications before concluding that he was competent. Therefore, the applicant did not establish that her right to an interpreter was infringed.

### Preliminary Conference

18. (1) The Refugee Division may, by a notice appear, direct the parties to attend, and participate in, a preliminary conference with a refugee hearing officer on any matter concerning a claim, in order to provide for a full and proper hearing and to dispose expeditiously of the claim.

(2) During the preliminary conference, the refugee hearing officer shall,

(a) ascertain that the information form referred to in rule 14 has been properly completed and signed by the person concerned;

(b) review the information and documents provided by the person concerned, in order to

(i) ascertain whether there is any missing information or discrepancy,

(ii) ascertain the basis for the claim of the person concerned, and

(iii) define, and, where possible, arrive at a consensus with the person concerned regarding issues that relate to the claim;



(c) where possible, identify the evidence that the person concerned intends to produce at the hearing; and

(d) where necessary, discuss any other matter with the person concerned that could assist in expediting the claim.

(3) After the preliminary conference, the refugee hearing officer shall make a report, and

(a) where the Minister has given notice of the Minister's intention to participate at a hearing within the periods referred to in subrule 8(2) or where the refugee hearing officer is of the opinion that the person cannot be determined to be a Convention refugee without a hearing, shall notify the registrar so that a date for a hearing may be fixed; or

(b) where the Minister has not given notice of the Minister's intention to participate at a hearing within the periods referred to in subrule 8(2), and where the refugee hearing officer is of the opinion that the person could be determined to be a Convention refugee without a hearing, shall forward the file to a member so that the member may decide, in accordance with subsection 69.1(7.1) of the Act and rule 19, whether the person concerned is a Convention refugee, without a hearing into the matter.

#### Determination of Claim Without a Hearing

19. (1) Where a member receives a file pursuant to paragraph 18(3)(b), the member, before determining that the person concerned is a Convention refugee without a hearing into the matter, shall verify that

(a) the Minister has not given notice of the Minister's intention to participate at the hearing within the periods referred to in subrule 8(2); and

(b) the information with respect to the claim that is provided by the person concerned is sufficient to enable the member to determine that the person concerned is a Convention refugee, without a hearing into the matter.

(2) Where, after verification of the matters in subrule (1), a member determines that the person concerned is a Convention refugee, the member shall forthwith render the member's decision and shall send the file to the registrar.

(3) Where a member decides that the person concerned cannot be determined to be a Convention refugee without a hearing into the matter, the member shall send the file to the registrar so that a date for a hearing may be fixed.

#### Conferences

20. (1) The Refugee Division may direct the parties, by a notice to appear, to attend a conference, that is to be held before or during a hearing, with one or more members or a refugee hearing officer on any matter related to

a claim or application, in order to provide for a full and proper hearing and to dispose of the claim or application expeditiously.

(2) At the conference, the participants, unless they have done so at a preliminary conference held pursuant to rule 18, shall

(a) exchange the names and addresses of witnesses that they intend to call, copies of any document that they intend to produce and of any statement of the facts, information and opinions of which they are in possession and that they intend to produce as evidence at the hearing; and

(b) attempt to agree on means of simplifying the hearing and, as far as possible, define any pertinent issues, agree upon certain facts and receive documents.

(3) Any agreement concluded at a conference shall be in writing and signed by the participants or given orally at the hearing and shall govern the hearing to the extent that the Refugee Division considers appropriate in order to provide for a full and proper hearing and to dispose of the claim or application expeditiously.

(4) Forthwith after a conference, a member or the refugee hearing officer, as the case may be, shall file at the registry any written agreement concluded and the original of any documents that have been received during the conference.

### Disclosure

21. A party or a refugee hearing officer who intends to call an expert witness at a hearing shall, at least 20 days before the date set for the hearing, serve on every party and file at the registry a report signed by the expert witness, setting out the name, address and qualifications of the expert witness and a brief summary of the substance of the proposed testimony of the expert witness.

### Applications for Public Hearings and Confidentiality

22. (1) A person who makes an application pursuant to subsection 69(2) of the Act shall do so in writing to the Refugee Division and shall file it at the registry.

(2) The Refugee Division shall notify the parties forthwith of the application referred to in subrule (1).

(3) An application that is made pursuant to subsection 69(3) of the Act in response to an application referred to in subrule (1) shall be made to the Refugee Division in writing and filed at the registry.

(4) Subject to any measure taken or any order made pursuant to subsection 69(3.1) of the Act, the Refugee Division shall notify the person referred to

in subrule (1) and every party forthwith of the application referred to in subrule (3).

### Witnesses

23. (1) A party who calls a witness shall pay the witness the applicable fees and allowances set out in the *Federal Court Rules*.

(2) The Board shall pay witnesses called by the refugee hearing officer the applicable fees and allowances set out in the *Federal Court Rules*.

24. (1) The Refugee Division may, at the request of a party or of its own motion, exclude witnesses from a hearing until they are called to testify.

(2) No person may communicate to a witness who has been excluded pursuant to subrule (1) any evidence or testimony that is given during the course of a hearing until after the witness has testified.

25. (1) A party or refugee hearing officer who makes an application to summon a witness shall do so in writing and shall file it at the registry.

(2) Where a person fails to comply with a summons, the party who applied for the issuance of the summons may make an application in writing, accompanied by an affidavit setting out the facts on which the application is based, to the Refugee Division for a warrant and shall file the application at the registry.

(3) An application made under subrule (2) shall contain information to establish that

(a) the person named in the summons was served with the summons and was paid or offered a reasonable amount of attendance money but failed to comply with the requirements of the summons; and

(b) the appearance of the person named in the summons is necessary to ensure a full and proper hearing.

(4) A warrant issued on an application made under subrule (2) that directs a peace officer to cause the person named therein to be apprehended anywhere in Canada shall indicate the measures to be taken by the peace officer in respect of the detention or release of the person.

(5) The measures referred to in subrule (4) may include

(a) detaining the person in custody and forthwith bringing the person before the Refugee Division; and

(b) releasing the person on a recognizance, with or without sureties, conditional on the person's appearance at the date, time and place specified, to give or produce evidence at a hearing before the Refugee Division.



### Person Concerned in Custody

26. Where a person concerned is detained, the Refugee Division may order the person who detains the person concerned to bring the latter in custody to a conference or hearing held in respect of the person concerned.

### Applications

27. (1) Subject to subrule (2), an application referred to in rules 12, 13, 38 or 40 shall be

- (a) made in writing;
- (b) filed at the registry; and
- (c) served on every party.

(2) A party or, where applicable, a refugee hearing officer may make any application that is provided for in these Rules orally at a hearing where the members are satisfied that no injustice is likely to be caused to any party thereby.

(3) The Refugee Division may determine an application when it is satisfied that all parties have been given a reasonable opportunity to make representations.

### Motions

28. (1) Every application that is not provided for in these Rules shall be made by a party to the Refugee Division by motion, unless, where the application is made during a hearing, the members decide that, in the interests of justice, the application should be dealt with in some other manner.

(2) The motion shall consist of

- (a) a notice specifying the ground on which the motion is made;
- (b) an affidavit setting out the facts on which the motion is based; and
- (c) a concise statement of the law and of the arguments that are relied on by the applicant.

(3) The motion shall be

- (a) served on the other party to the proceeding; and
- (b) filed in duplicate, together with proof of service thereof, at the registry within five days after the date of service.

(4) Evidence in support of a motion shall be introduced by affidavit, unless the Refugee Division decides that, in the interests of justice, the evidence should be introduced in some other manner.

(5) The other party may, within seven days after being served with a motion, file at the registry a reply stating concisely the law and arguments relied on

by the party, accompanied by an affidavit setting out the facts on which the reply is based.

(6) A refugee hearing officer may, within seven days after the day on which the motion was filed, file at the registry a summary of the matters that the refugee hearing officer believes that the Refugee Division should take into consideration when deciding on the motion.

(7) The applicant may, within seven days after being served with a reply referred to in subrule (5) or a summary referred to in subrule (6), file a response thereto at the registry.

(8) A copy of the reply and affidavit filed pursuant to subrule (5), of the summary filed pursuant to subrule (6) and of the response filed pursuant to subrule (7) shall be served on every party within seven days after the date of service of the motion, reply or summary, as the case may be.

(9) The Refugee Division, on being satisfied that no injustice is likely to be caused, may dispose of a motion without a hearing.

### Decisions

29. In the event of a split decision on an interlocutory matter, the presiding member shall have the deciding vote.

30. The registrar shall sign all notices of decisions of the Refugee Division and shall forthwith serve the Minister and the person concerned with a copy of all such notices.

31. A request made to the Refugee Division pursuant to paragraph 69.1(11)(b) or 69.3(7)(b) of the Act for written reasons for a decision shall be in writing and filed at the registry.

### Abandonment

32. (1) Before declaring a claim to have been abandoned pursuant to subsection 69.1(6) of the Act or an application to have been abandoned pursuant to subsection 69.3(2) of the Act, the Refugee Division shall serve on the parties a notice to appear directing them to attend a hearing on the abandonment.

(2) The notice to appear shall also inform the parties that where, at the end of a hearing concerning an abandonment, the Refugee Division does not declare the claim or application to have been abandoned, the Refugee Division will forthwith commence or resume the hearing into the claim or application.

### Withdrawal

33. (1) A party may withdraw a claim or application either orally during a hearing or by notice in writing filed at the registry.

(2) The registrar shall forthwith notify in writing the Minister or the person concerned, as the case may be, of any withdrawal of a claim or application.

### Reinstatement

34. (1) A party who has withdrawn a claim or application may, by motion made pursuant to subrules 28(2) to (8), apply to the Refugee Division for reinstatement of the claim or application.

(2) The application for reinstatement shall be served on the Minister even where the Minister is not a party.

(3) The Refugee Division may grant the application for reinstatement of a claim or application if it is satisfied that there are sufficient reasons why the claim or application should be reinstated and that it is in the interests of justice to do so.

### Service and Filing

35. (1) Subject to subrule (5), service of any document in the course of any proceeding under these Rules shall be effected by personal service, by prepaid regular mail, by any mail service whereby the sender is provided with an acknowledgement of receipt, or by the telephone transmission of a facsimile of the document in accordance with subrule (3).

(2) A copy of any document served on a party pursuant to subrule (1), with the exception of the document referred to in paragraph 6(1)(c), shall also be served on that party's counsel, if any.

(3) A document that is served by telephone transmission of a facsimile shall include a cover page setting out

- (a) the sender's name, address and telephone number;
- (b) the name of the addressee;
- (c) the total number of pages transmitted, including the cover page;
- (d) the telephone number from which the document is transmitted; and
- (e) the name and telephone number of a person to contact in the event of transmission problems.

(4) Service by prepaid regular mail shall be considered to be effected on the date that is seven days after the date of mailing.

(5) Where service cannot be effected in accordance with subrule (1), the Chairperson may direct that service be effected by such means as will, to the extent possible, provide a party with the document and as will not likely cause injustice to any party.

(6) After service of a document has been effected by a party, the party shall file proof of service thereof at the registry.



**36. The person concerned shall notify the Refugee Division, in writing,**

- (a) within 10 days after being served with the information form referred to in rule 14, of the address of the party;**
- (b) forthwith, of the name and address for service of counsel of the person concerned; and**
- (c) forthwith, of any changes in the information referred to in paragraphs (a) and (b).**

**37. (1) A document shall be filed at the registry by serving it on an employee of the registry at which the file relating to the claim or application is held.**

**(2) The filing of a telephone transmission of a facsimile shall be considered to be effected on the date on which it is received by the registrar, as stamped on the facsimile.**

**(3) All documents submitted in the course of any proceeding under these Rules in a language other than English or French shall be accompanied by a translation in English or French that is certified to be correct, unless the Refugee Division decides that a translation is not necessary to provide for a full and proper hearing.**

#### **Time Limits**

**38. The Refugee Division may, on application by a party or a refugee hearing officer made in accordance with rule 27, either before or after a time limit set out in these Rules has expired, shorten or extend the time limit, in order to provide for a full and proper hearing.**

#### **General**

**39. These Rules are not exhaustive and, where any matter that is not provided for in these Rules arises in the course of any proceeding, the Refugee Division may take whatever measures are necessary to provide for a full and proper hearing and to dispose of the matter expeditiously.**

*Kusi v. Canada (Min. of Employment & Immigration)* (1993), 19 Imm. L.R. (2d) 281, 65 F.T.R. 58.

An adjudicator and member of the Immigration and Refugee Board were conducting a credible basis hearing into the claim of a Convention refugee claimant, pursuant to provisions of the Immigration Act in effect on August 19, 1992.

The tribunal accepted as evidence notes taken by an immigration officer, which recorded answers given to him at the port of entry by the applicant. The applicant contested the accuracy of the notes and asked that the officer be produced for cross-examination, a request which was denied by the tribunal.

The decision by the tribunal that there was no credible basis to the applicant's claim was set aside and the matter was remitted back for determination in accordance with

the law. Specifically, the Court found that given the importance of the interest, namely the applicant's claim to be a Convention refugee, and given the fact that the applicant contested the accuracy of the notes which were relied upon by the tribunal, the rules of natural justice and of fundamental justice required that the cross-examination, which was sought, be allowed. The Court relied on the jurisprudence in *Canada (Min. of Employment & Immigration) v. Leal* (1991), 129 N.R. 383 (Fed. C.A.) and *Cheung v. Canada (Min. of Employment & Immigration)* (1981), 122 D.L.R. (3d) 41.

*Editor's Note:* Although occurring in the context of a repealed refugee hearing procedure, the principle in this case may have a broader application.

*Salinas v. Canada (Min. of Employment & Immigration)*, [1992] 3 F.C. 247, 6 Admin. L.R. (2d) 154, 93 D.L.R. (4th) 631, 17 Imm. L.R. (2d) 118, 142 N.R. 211, 57 F.T.R. 159 (note) (C.A.).

This was an appeal from an order of the Trial Division whereby a decision of the Refugee Division to reconvene a hearing into the respondent's claim for refugee status was quashed and the Refugee Division ordered to render a decision on the basis of the evidence before it. The basis of the respondent's claim was her fear of persecution by agents of the state of Panama, which was headed by General Noriega. Some time after the conclusion of the respondent's hearing, but before a decision was rendered, the political situation in Panama changed. The presiding member of the panel notified the respondent that the hearing would be reconvened for the propose of hearing evidence on these recent changes.

The appeal was allowed. The Refugee Division did not exceed its jurisdiction in reconvening the hearing. Section 68 endows the Refugee Division with powers and duties in relation to any proceedings before it. The distinction has been drawn by Parliament between "proceedings" and a "hearing" before the Refugee Division. The hearing is to be conducted in a manner required by section 69.1. The "hearing" is a step in any proceedings. "Proceedings" is a wider term encompassing the entire matter before the Refugee Division including the hearing itself. The Minister, pursuant to section 69.2(1), is able to initiate proceedings for a determination whether any person who was determined to be a Convention refugee has ceased to be so. The Court found force in the argument that evidence of the change of conditions is better addressed in the same proceedings rather than in new proceedings initiated by the Minister subsequent to the Refugee Division's determination.

The Refugee Division was not *functus officio*. It had yet to make a determination of the claim. Until it did, the proceedings were pending and finality had not been reached. In order to arrive at its decision, the Refugee Division could exercise the power conferred by the statute, provided it did so properly by giving the respondent an opportunity to be heard at the reconvened hearing. An inquiry into any change of conditions in the appellant's homeland comes within the general mandate of the refugee division in determining the claim.

In *Lawal v. Canada (Min. of Employment & Immigration)*, [1991] 2 F.C. 404, the Court ruled that the only way for the Refugee Division, after the end of a hearing but before decision, to consider new evidence beyond that of which it might take judicial notice was by reopening the hearing. The Court's decision in *Longia v. Canada (Min. of Employment & Immigration)*, [1990] 3 F.C. 288, applies only where the Refugee Division has already reached a decision.

The appeal was allowed. The order of the Trial Division was set aside and the respondent's claim for refugee status was referred back to the Refugee Division for a continuation of the reconvened hearing.

**40. Where a party or a refugee hearing officer does not comply with a requirement of these Rules, the Refugee Division, on application made by the party or refugee hearing officer in accordance with rule 27, may permit the party or refugee hearing officer to remedy the non-compliance or may waive the requirement, where it is satisfied that no injustice is thereby likely to be caused to any party or the proceeding will not be unreasonably impeded.**



# Adjudication Division Rules

## SOR/93-47

### RULES GOVERNING THE ACTIVITIES OF, AND THE PRACTICE AND PROCEDURE IN, THE ADJUDICATION DIVISION OF THE IMMIGRATION AND REFUGEE BOARD

#### Short Title

1. These Rules may be cited as the *Adjudication Division Rules*.

#### Interpretation

2. In these Rules,

“Act” means the *Immigration Act*;

“counsel” means a person who represents a party in any proceeding before the Adjudication Division;

“director” means a director of the Adjudication Division;

“held” means, in respect of an inquiry, held, reopened, resumed or continued;

“notice to appear” means a notice to appear referred to in rule 9;

“party” means the person concerned or the Minister;

“person concerned” means a person who is the subject of an inquiry or a person referred to in subrule 28(1);

“registrar” means a person designated pursuant to rule 4;

“registry” means an office established by the Board pursuant to rule 3.

#### Registry and Registrar

3. The Board shall establish one or more offices for the activities of the Adjudication Division, each of which is to be known as a registry.

4. The Board shall designate a person to be registrar at each registry.

#### Request for Inquiry

5. (1) Where an inquiry is caused to be held pursuant to the Act, the senior immigration officer shall forward to the Adjudication Division a request for inquiry that contains the following information:

- (a) the name, sex, date of birth, civil status and citizenship of the person concerned;

- (b) the address and telephone number in Canada of the person concerned;
- (c) any report and direction that relate to the person concerned;
- (d) a statement as to whether the person concerned claims to be a Convention refugee;
- (e) a statement as to whether the person concerned is detained and if so, the place of detention;
- (f) where any members of the family who are dependent on the person concerned and who are in Canada are included for the purposes of subsection 33(1) of the Act, the name, sex, date of birth, civil status, citizenship, address and telephone number of those dependent family members;
- (g) the official language chosen by the person concerned for communication with the Adjudication Division;
- (h) where applicable, the language or dialect of the interpreter required by the person concerned for any proceeding;
- (i) the Canada Employment and Immigration Commission Client I.D. Number relating to the person concerned;
- (j) where applicable, the names of the family members of the person concerned who have been referred to the Adjudication Division for an inquiry and the file number of the Canada Employment and Immigration Commission relating to those family members;
- (k) the date on which the senior immigration officer forwards the request for inquiry; and
- (l) the name of the senior immigration officer.

(2) The senior immigration officer shall forward the information referred to in subrule (1) to the registry designated by the Adjudication Division.

#### Joinder

6. (1) The Adjudication Division may order that two or more inquiries be held jointly where the Adjudication Division believes that no injustice is thereby likely to be caused to any party.

(2) Subject to subsection (3), inquiries in respect of the legal or *de facto* spouse, dependant children, father, mother, brothers or sisters of the person concerned shall be held jointly.

(3) On application by a party or on the adjudicator's own motion at the time of the inquiry, the adjudicator may order that inquiries be held separately, where the adjudicator believes that holding hearings jointly is likely to cause an injustice to any party.

#### Change of Venue

7. (1) A party may apply in accordance with rule 19 to the Adjudication

Division to have a conference or hearing held at a place other than that which has been set.

(2) An application made under subrule (1) shall be accompanied by a statement of facts to support the application.

(3) The Adjudication Division shall grant the application made under subrule (1) if it is satisfied that doing so will not adversely affect the proper operation of the Adjudication Division, will provide for a full and proper hearing and will dispose of the inquiry expeditiously.

(4) Where an application made under subrule (1) is granted, the file relating to the inquiry shall be transferred to the registry of the place where the conference or hearing is to be held.

### **Postponement and Adjournment**

8. (1) Before the commencement of a hearing, a party may apply in accordance with rule 19 to the Adjudication Division to have the hearing postponed.

(2) Before the resumption of a hearing, a party may apply in accordance with rule 19 to the Adjudication Division to have the hearing adjourned.

(3) A party whose application for a postponement or adjournment was denied may reapply orally at the commencement or resumption of the hearing.

(4) The Adjudication Division, in determining whether a hearing shall be postponed or adjourned, may take into consideration, where applicable,

- (a) whether the postponement or adjournment would unreasonably impede the proceedings;
- (b) the efforts made by the parties to proceed expeditiously;
- (c) the nature and complexity of the issues relevant to the proceeding;
- (d) the nature of the evidence to be presented, and the likelihood of causing an injustice to any party by proceeding in the absence of that evidence;
- (e) counsel's knowledge of, and experience with, similar proceedings;
- (f) the amount of time already afforded the parties for preparation of the case;
- (g) the efforts made by the parties to be present at the hearing;
- (h) the efforts made by the parties to make an application for a postponement or adjournment of the hearing at the earliest opportunity;
- (i) the number of, and reasons for, any previous postponements or adjournments;
- (j) whether the hearing was set peremptorily; and
- (k) any other relevant facts.



**Subsection (4)**

*Osei v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1813, September 2, 1993.

The applicant claimed Convention refugee status. Pursuant to the procedures in effect at the time this case arose, a credible basis hearing was required to be held. On August 28, 1992 the credible basis tribunal determined that the applicant did not have a credible basis for his claim. The applicant was directed then to reappear on October 23, 1992 in order that an exclusion order could be made against him. On that date the applicant presented a letter from his counsel indicating that counsel was unavailable. The adjudicator properly exercised his discretion to refuse an adjournment. The proper factors to be considered by an adjudicator are set out in *Siloch v. Canada (Min. of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 239 at 241-42. Those factors are:

1. whether the applicant has done everything in his or her power to be represented by counsel;
2. the number of previous adjournments granted;
3. the length of time for which the adjournment is being sought;
4. the effect on the immigration system;
5. whether the adjournment would cause needless delay, impede or paralyse the conduct of the inquiry;
6. the fault or blame to be placed on the applicant for not being ready;
7. whether any previous adjournments were granted on a peremptory basis; and
8. any other relevant factors.

*Siloch v. Canada (Min. of Employment & Immigration)* (1993), 18 Imm. L.R. (2d) 239, 151 N.R. 76 (Fed. C.A.).

Although decided under a regulation which has been repealed, this case does set out certain general observations about when it is appropriate to grant an adjournment.

In the circumstances of this case, the intention of the applicant to proceed was unquestionable. The applicant had no reason to question the reliability of her counsel and did not know until the moment when he did not show up that an adjournment would be necessary. Furthermore, the adjudicator took into consideration a factor unknown to the applicant, i.e. that the applicant's counsel was known to be unreliable. The adjudicator did not inquire into the length of the adjournment being sought nor offer the applicant a short adjournment to enable her to find new counsel. There was no reason on the evidence to believe that a short adjournment would affect the immigration system or needlessly delay, impede or paralyze the conduct of the inquiry. Thus, having regard to all the circumstances, the findings of the adjudicator and the deportation order made were quashed and the matter was referred back to another adjudicator for rehearing and reconsideration.

*Calles v. Canada (Min. of Employment & Immigration)* (1990), 12 Imm. L.R. (2d) 48 (Fed. C.A.).

The deportation order was set aside. The adjudicator refused an adjournment for the sole reason that the inquiry had already been adjourned a number of times in order to enable the applicant to be represented by counsel. The adjudicator should have taken

into consideration all the circumstances of the case which clearly show that the applicant had done everything in his power to be represented by legal counsel and that a short adjournment would enable him to achieve that result.

*Pacheco v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 28, 71 D.L.R. (4th) 762, 111 N.R. 373 (Fed. C.A.).

The applicant obtained leave to have a deportation order made against her reviewed by the Court. The applicant entered Canada illegally from the United States with her boyfriend concealed in the back of a transport vehicle. At the time of her inquiry, she was 33½ weeks into pregnancy. The deportation order in question was made on October 31, 1989 and the birth of her child was expected in November or early December 1989. The case presenting officer recommended a departure notice. The applicant testified that her boyfriend was the father of the child and that his mother and other family members already resided in Canada. Her evidence was also to the effect that he had sought landing pursuant to a Minister's Permit which was shortly to be issued. The two apparently had agreed to be married after the boyfriend became a permanent resident of Canada. The applicant had testified that she could not say how soon after the child was born that she would be able to leave Canada because she did not know whether the baby would be born healthy. The adjudicator was concerned that issuing a departure notice for her departure on a specified date might not be possible given the uncertainties in the case at October 31, 1989. Counsel for the applicant suggested an adjournment until after the child was born. The adjudicator refused the adjournment and issued a deportation order and asserted on two occasions that the adjudicator felt compelled "to decide the case today" or "to make the decision today." This decision amounted to a failure on the part of the adjudicator to exercise his discretion. Nothing in the Act requires the adjudicator to make the deport/depart decision on any specific day; it was open to the adjudicator to adjourn the inquiry and by declining to consider the request, the adjudicator misdirected himself.

*Prasad v. Canada (Min. of Employment & Immigration)*, [1989] 1 S.C.R. 560, [1989] 3 W.W.R. 289, 36 Admin. L.R. 72, 7 Imm. L.R. (2d) 253, 93 N.R. 81, 57 D.L.R. (4th) 663.

The issue was whether the adjudicator of an immigration inquiry must adjourn to enable the person concerned to pursue an application to the Minister under section 37(1) of the Immigration Act. In a 4 to 2 decision, the majority of the Court held that the adjudicator is neither bound to accede to a request for an adjournment to enable an application under section 37 to be brought, nor is the adjudicator required to refuse it. The adjudicator must consider such factors as the number of adjournments already granted and the length of time for which an adjournment is sought in exercising discretion to adjourn. The adjudicator also must consider the opportunity available to the subject of the inquiry to apply to the Minister prior to the request for an adjournment. The majority of the Court distinguished the case at bar with *Ramawad v. Min. of Manpower & Immigration*, [1978] 2 S.C.R. 375, 81 D.L.R. (3d) 687, 18 N.R. 69 (S.C.C.), and held that *Ramawad* must be read in the context of its facts and the particular employment visa provisions in effect at the time of that decision.

*Martin v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-249-88, May 9, 1988.

While there is no obligation on an adjudicator to adjourn when there has been a request to the Governor-in-Council under section 115(2), the adjudicator does retain discretion to adjourn. If the adjudicator, in refusing an adjournment, fails to exercise that discretion, a section 28 application will be allowed, the exclusion order set aside, and the matter remitted to the adjudicator to resume the inquiry at the point where the applicant requested an adjournment.

*Min. of Employment & Immigration v. Widmont*, [1984] 2 F.C. 274 (Fed. C.A.).

The respondent legally entered Canada from Poland. She spoke neither French nor English. The immigration officer spoke no Polish and there was no interpreter. The respondent was admitted for 4 days. Unaware of this limitation she stayed for a much longer period and married her husband, a Canadian citizen. The respondent sought to clarify her status with the result that a direction for inquiry was issued in her case. She applied for a Minister's permit during the course of the inquiry. Prohibition was granted by the trial division to prevent the inquiry from concluding before the Minister gave his decision on whether or not to issue a permit. On Appeal it was held that the refusal of the adjudicator to adjourn was consistent with earlier decisions of the Federal Court on this question. There is a particularly strong dissent on this question by Mr. Justice MacGuigan and the law of *stare decisis* is described in the judgment of Mr. Justice Urie who concurred in the majority decision. This was important because the majority judgment ruled that previous Courts considered the issue raised by this case and, accordingly, the Court in this case was obliged to follow its previous decisions. Mr. Justice Urie noted that the Federal Court of Appeal should refuse to follow its previous decisions only if it was convinced that the earlier decisions were incorrect.

*Han v. Min. of Employment & Immigration* (1984), 52 N.R. 274 (Fed. C.A.).

The respondent was admitted to Canada conditional upon his marrying within 90 days. The marriage did not take place. Request for cancellation of the condition was refused and an inquiry commenced. During the course of the inquiry the respondent acquired the right to apply for citizenship. The adjudicator refused the respondent's request for an adjournment so his application for citizenship could be processed. The trial division quashed this decision of the adjudicator. The Court of Appeal over-ruled the trial division and upheld the adjudicator, ruling that the sole purpose of the inquiry was to ascertain whether or not the respondent was described in section 27(1)(b). The Court ruled that the fact that the respondent might have a right to become a Canadian citizen was not relevant to the inquiry and, therefore, there was no need to adjourn the inquiry pending the outcome of the citizenship application. The Court ruled, as well, that the purpose for which the adjournment was sought had nothing to do with ensuring a full and proper inquiry.

The Court observed that section 72(1)(b) of the Act entrusted to the Immigration Appeal Board and not the adjudicator, the exercise of an equitable jurisdiction to order the respondent not be removed from Canada.

*Taubler v. Min. of Employment & Immigration*, [1981] 1 F.C. 620 (Fed. C.A.).

It was within the mandate of an adjudicator to adjourn the inquiry, after the hearing



of evidence and argument, so that the subject matter of the report giving rise to the inquiry could be investigated further.

*Samra v. Min. of Employment & Immigration*, [1981] 1 F.C. 626 (Fed. T.D.).

The Court declined to issue a writ of prohibition and followed what it termed “convincing jurisprudence” in concluding that the application for the writ was premature. The applicant argued that the continuation of an inquiry based on his having overstayed was being carried on with unseemly haste because the question of his remaining in Canada as a sponsored relative was about to be decided by the Immigration Appeal Board. The proper course was to request an adjournment of the inquiry pending the outcome of the Immigration Appeal Board’s decision. Refusal of the writ was without prejudice to the applicant’s instituting further proceedings should the adjournment be refused.

*McCarthy v. Min. of Employment & Immigration*, [1979] 1 F.C. 121 (Fed. C.A.).

At the conclusion of one day’s evidence, an inquiry was adjourned to a date which was not convenient for the applicant’s counsel. On the resumed date the inquiry was again adjourned to a date when the adjudicator knew that counsel would be out of the country. The inquiry proceeded on this last adjourned date and a deportation order was made. However, the Federal Court set aside the deportation order and referred the matter back to the immigration authorities for a new inquiry.

### Notice to Appear

**9. (1) Where the Adjudication Division directs a party to appear before it at a conference or hearing, the Adjudication Division shall, in a notice to appear, set out**

- (a) the date, time and place set for the conference or hearing;**
- (b) the name and address in Canada of the person concerned;**
- (c) the Canada Employment and Immigration Commission Client I.D. Number relating to the person concerned;**
- (d) the names and addresses of the family members of the person concerned referred to in paragraph 5(1)(f);**
- (e) the purpose of the conference or hearing;**
- (f) the right of the person concerned and any of any person referred to in paragraph (d) to be represented by counsel at their own expense;**
- (g) the requirement that the person concerned inform the Adjudication Division forthwith, in writing, of any change of address of the person concerned or of counsel of the person concerned; and**
- (h) that the person concerned could be arrested for failing to appear at the date, time and place set for the conference or hearing.**

**(2) The Adjudication Division shall serve the parties and any person referred to in paragraph (1)(d) with the notice to appear and a copy of any report and direction that relate to the person concerned who is subject of the inquiry.**

### Official Languages

10. At least 15 days before the date set for a conference or hearing, as the case may be, the person concerned shall notify the Adjudication Division, in writing, of the official language in which the person concerned chooses the conference or hearing to be conducted.

### Interpreter

11. (1) The Adjudication Division shall provide an interpreter to assist a party or a party's witness where the party advises the Adjudication Division, in writing, at least 15 days before the date set for a conference or hearing, as the case may be, that the party or witness does not understand or speak the language in which the conference or hearing is to be conducted, or is hearing impaired.

(2) The interpreter shall take an oath or make a solemn affirmation to interpret accurately any statements made, and to translate accurately any documents that the Adjudication Division may require to be translated, in the course of the conference or hearing.

*Varaich v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 143.

A tribunal is under a clear duty to make an inquiry into an interpreter's competence once an objection is made. Being the master of his or her proceeding, the adjudicator may call a witness if it is necessary to determine the competence of the interpreter and ensure a fair hearing, but this is not obligatory. The adjudicator did not rely on the interpreter's reputation, but asked the applicant directly what she did not understand. Further, the adjudicator engaged in a relatively lengthy questioning of the interpreter as to his qualifications before concluding that he was competent. Therefore, the applicant did not establish that her right to an interpreter was infringed.

*Yu v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 241.

The applicant complained about the quality of the interpretation of her testimony and filed in support an affidavit commenting on the accuracy of the translation. The Court could not give effect to the general statements about the quality of interpretation due to the fact that the affidavit lacked sufficient specific examples. However, the decision was set aside because the one example of inaccuracy that was referred to formed the basis for the finding that the applicant's testimony was exaggerated. The Court could not be certain that the Board would have concluded that the fear of persecution was exaggerated had there been a proper interpretation of this evidence. Accordingly, the decision of the Refugee Division was quashed.

*Xie v. Canada (Min. of Employment & Immigration)*, [1990] 2 F.C. 336, 2 C.R.R. (2d) 374, 10 Imm. L.R. (2d) 284, 107 N.R. 296 (sub nom. *Ming v. Canada (Min. of Employment & Immigration)*) (C.A.).

Section 46.01(6) does not make it mandatory for the adjudicator and member of

the refugee division to hear evidence regarding subparagraphs (a) and (b) of that section as a precondition to a credible basis decision.

The applicant's counsel raised three objections to the interpretation; the speed at which the interpreter was speaking, her dialect in Chinese and her incorporation of English words. The adjudicator took note only of the first objection. The other two problems were not considered. The objection raised by the applicant's counsel was a serious one.

*Ictensev v. Canada (Min. of Employment & Immigration)* (1988), 7 Imm. L.R. (2d) 306, 43 C.R.R. 147 (Ont. H.C.).

The applicant arrived in Canada and was denied immigrant status. He was released on a bond and attended at his inquiry on two occasions pursuant to the terms of his release. On the second occasion, he was held in detention following the inquiry. At the inquiry, the applicant was not provided with a satisfactory interpreter. The adjudicator did not adjourn the inquiry but, rather, ordered the applicant's detention, and subsequent reviews of that detention relied on the evidence provided through the services of this unsatisfactory interpreter. The failure to provide an interpreter was not only a violation of the Regulations under the Immigration Act, but was also contrary to section 14 of the Charter of Rights. Therefore, the applicant's original detention was illegal. Reliance upon the evidence given through the services of the unsatisfactory interpreter at subsequent detention reviews, tainted those detention orders. Therefore, the initial Charter violation was not cured at these subsequent detention review hearings. An order granting the application for *habeas corpus* was made.

*Faiva v. Min. of Employment & Immigration*, Fed. C.A., Doc. No. A-696-82, March 21, 1983.

An adjudicator does not have authority to proceed with an inquiry and to receive the evidence of the person concerned without an interpreter unless he is satisfied that the person concerned is able to understand and communicate in the language of the inquiry. The adjudicator was clearly not so satisfied and, thus, had no right to continue the inquiry in question or to relax the normal standard or requirement concerning the ability to understand and communicate in the language of the inquiry. Accordingly, the deportation order was set aside.

### Conferences

**12. (1) The Adjudication Division may direct the parties, by notice to appear, to attend a conference, that is to be held before or during a hearing, on any matter related to the inquiry, in order to provide for a full and proper hearing and to dispose of the inquiry expeditiously.**

**(2) At the conference the participants shall**

**(a) exchange the names and addresses of witnesses that they intend to call, copies of any document that they intend to produce and of any statement of the facts, information and opinions of which they are in possession and that they intend to produce as evidence at the hearing; and**

**(b) attempt to agree on means of simplifying the hearing and, as far as**



possible, define any pertinent issues, agree upon certain facts and receive documents.

(3) Any agreement concluded at a conference shall be in writing and signed by the participants or given orally at the hearing and shall govern the hearing to the extent that the Adjudication Division considers appropriate in order to provide for a full and proper hearing and to dispose of the inquiry expeditiously.

(4) Forthwith after a conference, the adjudicator shall forward to the registry any written agreement concluded and a true copy of any documents that have been received during the conference.

### Disclosure

13. A party who intends to call an expert witness at a hearing shall, at least 20 days before the date set for the hearing, serve on the other party a report signed by the expert witness, setting out the name, address and qualifications of the expert witness and a brief summary of the substance of the proposed testimony of the expert witness.

### Applications for Confidentiality

14. An application referred to in subsection 29(2) or 103(10) of the Act shall be made to the Adjudication Division by motion in accordance with subrules 21(2) to (7).

### Witnesses

15. A party who calls a witness shall pay the witness the applicable fees and allowances set out in the *Federal Court Rules*.

16. (1) The Adjudication Division may, at the request of a party or of its own motion, exclude witnesses from a hearing until they are called to testify.

(2) No person may communicate to a witness who has been excluded pursuant to subrule (1) any evidence or testimony that is given during the course of a hearing until after the witness has testified.

17. (1) A party who makes an application to summon a witness shall do so in writing and shall file it at the registry.

(2) Where a person fails to comply with a summons, the party who applied for issuance of the summons may make an application in writing, accompanied by an affidavit setting out the facts on which the application is based, to the Adjudication Division for a warrant and shall file the application at the registry.

(3) An application made under to subrule (2) shall contain information to establish that

(a) the person named in the summons was served with the summons and was paid or offered a reasonable amount of attendance money but failed to comply with the requirements of the summons; and

(b) the appearance of the person named in the summons is necessary to ensure a full and proper hearing.

(4) A warrant issued on an application made under subrule (2) that directs a peace officer to cause the person named therein to be apprehended anywhere in Canada shall indicate the measures to be taken by the peace officer in respect of the detention or release of the person.

(5) The measures referred to in subrule (4) may include

(a) detaining the person in custody and forthwith bringing the person before the Adjudication Division; and

(b) releasing the person on a recognizance, with or without sureties, conditional on the person's appearance at the date, time and place specified, to give or produce evidence at a hearing before the Adjudication Division.

### **Person Concerned in Custody**

18. Where a person concerned is detained, the Adjudication Division may order the person who detains the person concerned to bring the latter in custody to a conference or hearing held in respect of the person concerned.

### **Applications**

19. (1) Subject to subrule (2), every application that is provided for in these Rules, except an application referred to in rules 14 and 17 and subrule 21(3), shall be

(a) made by a party in writing;

(b) filed at the registry; and

(c) served on the other party.

(2) A party may make an application that is provided for in these Rules orally at a hearing where the adjudicator is satisfied that no injustice is likely to be caused to any party thereby.

(3) The Adjudication Division may determine the application when it is satisfied that all parties have been given a reasonable opportunity to make representations.

### **Motions**

20. (1) Every application that is not provided for in these Rules shall be made by a party to the Adjudication Division by motion, unless, where the

application is made during a hearing, the adjudicator decides that, in the interests of justice, the application should be dealt with in some other manner.

(2) The motion shall consist of

- (a) a notice specifying the grounds on which the motion is made;
- (b) an affidavit setting out the facts on which the motion is based; and
- (c) a concise statement of the law and of the arguments that are relied on by the applicant.

(3) The motion shall be

- (a) served on the other party to the proceeding; and
- (b) filed in duplicate, together with proof of service thereof, at the registry within five days after the date of service.

(4) Evidence in support of a motion shall be introduced by affidavit, unless the Adjudication Division decides that, in the interests of justice, the evidence should be introduced in some other manner.

(5) The other party may, within seven days after being served with a motion, file at the registry a reply stating concisely the law and arguments relied on by the party, accompanied by an affidavit setting out the facts on which the reply is based.

(6) The applicant may, within seven days after being served with a reply, file a response thereto at the registry.

(7) A copy of the reply and affidavit filed pursuant to subrule (5) and of the response filed pursuant to subrule (6) shall be served on the other party within seven days after the date of service of the motion or reply, as the case may be.

(8) The Adjudication Division, on being satisfied that no injustice is likely to be caused, may dispose of a motion without a hearing.

### Decisions

21. (1) Where, at the conclusion of an inquiry, the adjudicator decides to make a removal order or conditional removal order against a person concerned, the adjudicator shall

- (a) date and sign the order and decision that sets out the basis on which the order was made; and
- (b) where the person does not have grounds to appeal the decision to the Appeal Division pursuant to section 70 of the Act, inform the person and the person's counsel by a notice in writing of the person's right to file an application for leave to commence an application under section 18.1 of the *Federal Court Act*.



(2) A copy of the documents referred to in paragraphs (1)(a) and (b) shall be

(a) where the parties or their counsel, or both, are present when the Adjudicator makes the order, given forthwith to the parties or their counsel or both, as the case may be; and

(b) where the parties or their counsel, or both, are absent when the adjudicator makes the order, served on the parties or their counsel or both, as the case may be.

(3) The adjudicator shall, upon a request in writing of a party that is filed within 10 days after the conclusion of an inquiry, provide written reasons for the adjudicator's decision.

### Service and Filing

22. (1) Subject to subrule (5), service of any document in the course of any proceeding under these Rules shall be effected by personal service, by prepaid regular mail, by any mail service whereby the sender is provided with an acknowledgement of receipt, or by the telephone transmission of a facsimile of the document in accordance with subrule (3).

(2) A copy of any document served on a party pursuant to subrule (1) shall also be served on that party's counsel, if any.

(3) A document that is served by telephone transmission of a facsimile shall include a cover page setting out

(a) the sender's name, address and telephone number;

(b) the name of the addressee;

(c) the total number of pages transmitted, including the cover page;

(d) the telephone number from which the document is transmitted; and

(e) the name and telephone number of a person to contact in the event of transmission problems.

(4) Service by prepaid regular mail shall be considered to be effected on the date that is seven days after the date of mailing.

(5) Where service cannot be effected in accordance with subrule (1), the Chairperson may direct that service be effected by such means as will, to the extent possible, provide a party with the document and will not likely cause injustice to any party.

(6) After service of a document has been effected by a party, the party shall file proof of service thereof at the registry.

23. The person concerned and any family members of the person concerned referred to in paragraph 5(1)(f) shall notify the Adjudication Division forthwith

in writing of their addresses and the name and address for service of their counsel, and any changes thereto.

24. (1) A document shall be filed at the registry by serving it on an employee of the registry at which the file relating to the inquiry or the application referred to in subrule 29(1) is held.

(2) The filing of a telephone transmission of a facsimile shall be considered to be effected on the date on which it is received by the registrar, as stamped on the facsimile.

(3) All documents submitted in the course of any proceeding under these Rules in a language other than English or French shall be accompanied by a translation in English or French that is certified to be correct, unless the Adjudication Division decides that translation is not necessary to provide for a full and proper hearing.

### Time Limits

25. The Adjudication Division may, on application by a party made in accordance with rule 19, shorten or extend the time limit either before or after a time limit set out in these Rules has expired, in order to provide for a full and proper hearing.

### General

26. These Rules are not exhaustive and, where any matter that is not provided for in these Rules arises in the course of any proceeding, the Adjudication Division may take whatever measures are necessary to provide for a full and proper hearing and to dispose of the matter expeditiously.

27. Where a party does not comply with a requirement of these Rules, the Adjudication Division, on application made in accordance with rule 19, may permit the party to remedy the non-compliance or may waive the requirement, where it is satisfied that no injustice is thereby likely to be caused to any party or the proceeding will not be unreasonably impeded.

### Review of Reasons for Detention

28. (1) Where, pursuant to subsection 103(6) of the Act, a person concerned must be brought before an adjudicator for a review of the reasons for the continued detention of the person concerned, a senior immigration officer shall forward to the Adjudication Division forthwith the following information:

- (a) the date and time before which the hearing to review the reasons for the continued detention must be held;
- (b) the name and place of detention of the person concerned;

- (c) the number of the Canada Employment and Immigration Commission Client I.D. Number relating to the person concerned;
- (d) the official language chosen by the person concerned for the hearing for the purposes of rule 10;
- (e) where applicable, the language or dialect of the interpreter required by the person concerned for the purposes of rule 11;
- (f) the name, address for service and telephone number of the counsel of the person concerned, if any;
- (g) the date and time at which the person concerned was detained;
- (h) the purpose of the detention; and
- (i) whether the review is being held after 48 hours, seven days or 30 days of detention.

(2) The senior immigration officer shall forward the information referred to in subrule (1) to the registry designated by the Adjudication Division.

29. (1) Where a person concerned referred to in subrule 28(1) wishes to be brought before an adjudicator for a review of the reasons for detention pursuant to subsection 103(6) of the Act, the person concerned shall so apply to the Adjudication Division in accordance with rule 19.

(2) The application referred to in subrule (1) shall be accompanied by information referred to in paragraphs 28(1)(d) and (e) and a statement that sets out the reasons in support of the application.

30. Rule 7 and the time limits referred to in rules 10 and 11 do not apply in respect of the review of the reasons for detention referred to in rules 28 or 29.



# Federal Court Act

## R.S.C. 1985, c. F-7

[Sections 18-18.5 and 52 reproduced.]

**EXTRAORDINARY REMEDIES, FEDERAL TRIBUNALS — *Extraordinary remedies, members of Canadian Forces — Remedies to be obtained on application.***

18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) The Trial Division has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review under section 18.1. S.C. 1990, c. 8, s. 4.

**APPLICATION FOR JUDICIAL REVIEW — *Time limitation — Powers of Trial Division — Grounds of Review — Defect in form or technical irregularity.***

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

(3) On an application for judicial review, the Trial Division may

(a) order a federal board, commission or other tribunal to do any act or

thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

(5) Where the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Trial Division may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or order, make an order validating the decision or order, to have effect from such time and on such terms as it considers appropriate. S.C. 1990, c. 8, s. 5.

### *Subsection (1)*

*Popov v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 90.

The applicant emigrated to Israel from Russia under the Law of Return. He was entitled to do so because one of his grandparents was Jewish. He suffered discrimination in Israel because he was a new immigrant from Russia and because, while he was Jewish as a matter of racial ancestry, he was a member of the Russian Orthodox Christian church. The applicant applied for refugee status in Canada. The CRDD did not accept his claim, but that decision was rendered before the Supreme Court decision in *Ward v. Canada (Min. of Employment & Immigration)*, (sub nom. *Canada (Attorney General) v. Ward*) [1993] 2 S.C.R. 689 and the Federal Court decision in *Zolfagharkhani v. Canada (Min. of Employment & Immigration)*, [1993] 3 F.C. 540, 20 Imm. L.R. 1, 155 N.R. 311 (C.A.).

The application was dismissed from the Bench due to the fact that notwithstanding the errors complained of, no properly instructed Board could have found the applicant

to be a Convention refugee. The authority of the Court on a judicial review application is not the same as on an appeal. Even though one might find errors in a Board's decision, that does not, on a judicial review application, result in a decision to send the matter back for rehearing when the Court is convinced that no real purpose will be served by so doing. One does not quash and send it back just for the sake of having a new hearing. When it is clear from the evidence on the record and from the decision that no different result could be reached, the appropriate course of action is to refuse an order requiring that such be done.

The Court noted that the intertwined nature of "appeals" and "judicial review" was found in a recent paper by Madame Justice Desjardins: *Review of Administrative Action in the Federal Court of Canada: The New Style in a Pluralistic Setting*, Law Society of Upper Canada Special Lectures, 1992, at 404.

*Chen v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2926-93, April 8, 1994.

The applicant sought to overturn a negative decision of the CRDD. The tribunal accepted the applicant's testimony as trustworthy. In the course of giving its reasons, the tribunal misidentified the principal issue. The respondent urged that, despite this error, the conclusions of the tribunal were reasonable on the basis of the evidence before it and the decision as a whole was supportable.

The tribunal did err by not assessing the very bases claimed by the applicant as the grounds of his fear of persecution. While the evidence before the tribunal may be said to support the conclusion it reached, such an assessment is not for the Court on an application for judicial review. Aside from procedural issues, the Court, on a judicial review application, must be concerned with the decision rendered by the tribunal and the reasons expressed for its conclusion.

*Alfred v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1466-93, April 7, 1994.

In this application to review a negative decision of the CRDD, the applicant argued that the tribunal erred in misconstruing "persecution" and that the tribunal erred in law by ignoring or misconstruing the evidence before it. The respondent made reference to portions of the transcript of the hearing and to the documentary evidence before the tribunal, which it argued would warrant the conclusion that the findings of the tribunal were reasonable. The Court must review the decision as rendered by the tribunal and not the evidence to which the decision itself makes no reference but which would have warranted the conclusions reached by the tribunal if the tribunal had expressed reasons relying upon such evidence. The simple statement that the tribunal had reached its decision "after careful consideration of all the evidence adduced at the hearing" was not sufficient when the decision made little or no reference to the principal bases of the applicant's claim. The application was allowed in this case and the matter sent back for rehearing before a differently constituted panel of the CRDD.



**Subsection (3)**

*Argueta v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-3579-93, April 13, 1994.

The applicant sought judicial review contending that the trier of fact had made three errors of law which warranted the setting aside of the decision. The respondent conceded that the law had been misstated or misapplied in two respects, but suggested that applying the law correctly would support the conclusion of the tribunal and, implicitly, that the same result would follow any reconsideration of the matter. In an application for judicial review, aside from procedural issues, the jurisdiction of the Court is concerned with the decision as it has been rendered, not with a decision that might have but was not given. The Court may review the evidence before the tribunal only in relation to the decision rendered. It is not for the Court to assess what its decision might be on the evidence before the tribunal nor to speculate on the result if the matter be referred back for reconsideration, the outcome of which will be dependent upon the evidence and argument then before the reconsidering tribunal.

*Siad v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 6, 64 F.T.R. 271.

This was an application for a judicial review of the decision of the CRDD determining that the applicant was not a Convention refugee.

Two errors of law were cited: (1) the Refugee Division erred by not correctly identifying the social group to which the applicant belonged in deciding that her claim did not come within a group recognized in the definition; and (2) it erred in finding that her fear was not related to being a member of the social group that the Board placed her in.

These errors, if that is what they were, were not errors of law. The Refugee Division addressed the question of whether or not the applicant fell within a particular social group but did not identify that group correctly based on the evidence. Such an error is not an error in law. Similarly, a finding that an applicant's fear is based on a fear of random violence and is not a fear arising from being a member of a social group, may be an error, but it is not an error of law. Further, in this case, these findings of fact could not be characterized as having been made in a perverse or capricious manner or without regard to the material before the tribunal. Accordingly, the judicial review application was dismissed.

*Ali v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-700-93, April 11, 1994.

Section 18.1(3) of the Federal Court Act provides jurisdiction for the Court to issue directions of such specificity that they require the CRDD to declare an applicant to be a Convention refugee.

The Court should only exercise this jurisdiction after asking itself questions of this type:

1. Is the evidence on the record so clearly conclusive that the only possible conclusion is that the claimant is a Convention refugee?
2. Is the sole issue to be decided a pure question of law which will be dispositive of the case?

3. Is the legal issue based on uncontroverted evidence and accepted facts?
4. Is there a factual issue that involves conflicting evidence which is central to the claim?

*Xie v. Canada (Min. of Employment & Immigration)* (1994), 75 F.T.R. 125.

The Court's jurisdiction on applications for judicial review is found in section 18.1(3) of the Federal Court Act. There is nothing in the subsection that indicates that the Court has the jurisdiction to substitute its opinion for that of the tribunal whose decision is under judicial review and make the decision that the tribunal should have made. As such words do not appear in the Act, the Court does not have jurisdiction to substitute its decision for that of the tribunal in a judicial review application.

The Court does have jurisdiction to refer a matter back for redetermination in accordance with such directions as it considers appropriate. The Court should only issue directions to a tribunal in the nature of a directed verdict where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal.

*Nueda v. Canada (Min. of Employment & Immigration)* (1993), 21 Imm. L.R. (2d) 211, 65 F.T.R. 24.

The applicant came to Canada on the Foreign Domestic Program. She was negatively reviewed in November, 1983 and December, 1984. She did not leave Canada when her employment authorization expired and a warrant for her arrest was executed in October, 1987. The applicant claimed refugee status and obtained a work permit and she was employed from July, 1988 to June 24, 1992.

It was found that there were no humanitarian and compassionate considerations in her case and a departure notice was issued requiring her to leave Canada by August, 1992.

The Court emphasized that it was its responsibility to review the decision of the officers but that it was not sitting in appeal from that decision. The officers had all of the information before them and it could not be found that they had ignored any of it.

Counsel submitted that where a *prima facie* case of a *Charter* infringement has been made out, the Court must substantially review the decision and go beyond the common law grounds of judicial review. The Court agreed with this submission. It found, however, in this case that no *Charter* right of the applicant's had been breached. The Court went on to observe that even where there is a substantive review of a decision, section 18.1(3) of the Federal Court Act still governs the Trial Division's power on judicial review. In terms of a humanitarian and compassionate review, the Trial Division can direct that the review be conducted and that certain factors or directions be considered. It is not for the Court to conduct a review, but simply to indicate what is required to make a proper decision.

### **Subsection (4)**

*Bogdanov v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. A-1658-92, March 31, 1994.

This was an application to set aside a negative determination of the CRDD. The

applicants were all citizens of Bulgaria and the sole ground urged by the applicants was that the tribunal erred in its assessment that the cumulative effects of the various incidents of discrimination and harassment, as reported by the claimants, did not amount to persecution. The testimony of the applicants, according to the tribunal, "seemed credible, appeared to be given in good faith and without exaggeration".

The standard for the Court to intervene is set out in section 18.1(4)(c) and (d) of the Federal Court Act, R.S.C. 1985, c. F-7. The Court must be satisfied that the tribunal "erred in law in making a decision" or "based its decision . . . on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it". The appellants' argument was essentially that the tribunal reached the wrong conclusion in its assessment of the cumulative effect of the evidence. Even if the Court were inclined to share that view, there was no basis for finding that the tribunal's conclusion was unreasonable in law. Further, the tribunal's conclusion that the incidents of harassment did not individually or cumulatively constitute persecution could not be said to be perverse or capricious or made without regard to the material before the tribunal. The conclusion of the tribunal was one open to it on the evidence adduced. Accordingly, the application was dismissed.

*Gholam-Nejad v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-2479-93, March 31, 1994.

This application to review a negative decision of the CRDD was based on the denial to the applicant of her right to counsel because of the alleged manifest incompetence of her representative at the Refugee Board hearing. Section 18.1(4) of the Federal Court Act provides for relief where the CRDD acted or failed to act, or failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe, or erred in law, or based its decision or order on an erroneous finding of fact made in a perverse or capricious manner. Nothing on the face of that subsection would authorize the intervention of the Court where the issue is the failure on the part of the applicant's representative, rather than on the part of the CRDD itself. This is particularly true where the failure of the representative was not at all apparent to the CRDD and therefore the representative's failure could not be identified as a failure of the CRDD to ensure natural justice and fairness. Accordingly, this ground of attack could not succeed and the application was dismissed.

*Pal v. Canada (Min. of Employment & Immigration)* (1993), 70 F.T.R. 289.

The applicant sought review of a decision denying him Convention refugee status.

The applicant was not granted a recess, when he requested one, in order to review documents which were introduced into evidence and which he had not seen previously. The documents were introduced to contradict evidence which he had given. They were written in English. The applicant was testifying through an interpreter. The Court found that in refusing to allow the applicant and his counsel an opportunity to review the evidence, the applicant was denied the opportunity to answer the case against him and a breach of natural justice occurred.

The Court pointed out that relief under section 18.1(4) of the Federal Court Act is discretionary and thus, if no prejudice is caused by an erroneous procedure or decision, an order quashing that decision will not normally be given. If no real purpose will be served by requiring another hearing, one will not be ordered.

The Court was unable to conclude that the breach of natural justice which occurred



in the context of this case was minor and could not appreciably affect the final decision. The breach was not cured by subsequent actions and accordingly, the decision of the tribunal was quashed.

*Singh v. Canada (Min. of Employment & Immigration)* (1993), 69 F.T.R. 142.

The applicants sought to set aside a decision that they were not Convention refugees. This case discusses how findings on the evidence can be successfully challenged in the Trial Division.

The Court commented that section 18.1(4)(d) of the Federal Court Act set out disjunctive conditions under which a decision will be set aside. For purposes of paragraph (c) of that section, the Court noted that findings of fact which are unsupported by adequate evidence are errors in law — the so-called “no evidence rule”. Section 18.1(4)(d) allows the Court to set aside a decision which is made “without regard for the material before it”. This grants a broader right of review than the traditional “no evidence” test. It compels the setting aside of tribunal decisions where they are unreasonable. The phrase “perverse or capricious manner or without regard for the material before it” is accurately discussed in J.A. Kavanagh, *A Guide to Judicial Review* (1978) at 57-58.

The findings of fact can be divided into two classifications: findings of primary facts and inferences of fact which are drawn from the primary facts. Courts are reluctant to interfere with findings of primary facts made by tribunals. In areas where a tribunal has a particular expertise in drawing inferences, courts are inclined to treat those inferences with deference. If, however, the inference is of a type which is based on common experience, then the court is in equally as good a position as the tribunal to draw the inference and in that case deference is not shown.

In this particular case, the inferences of fact drawn by the Board did not stand up upon a review of the evidence and the decision refusing refugee status was set aside.

*Muhammed v. Canada (Min. of Employment & Immigration)* (1993), 67 F.T.R. 152.

The applicant applied to set aside a decision which determined that the applicant was not a Convention refugee. Section 18.1(4)(d) of the Federal Court Act provides that in an application for judicial review the Court may grant relief, *inter alia*, where the tribunal based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. This is the standard set by the Act and it emphasizes that it is not the role of the Court to substitute its decision for that of the tribunal, especially where the decision is based on an assessment of credibility. The decision of the Court of Appeal in *Giron v. Canada (Min. of Employment & Immigration)* (1992), 143 N.R. 238 (Fed. C.A.) was rendered at a time when the jurisdiction of the Court of Appeal included the authority to make the decision the Immigration and Refugee Board should have made, as well as the jurisdiction to refer the matter back to the Board for reconsideration.

The applicant claimed to be a Sudanese national who had been kidnapped by an insurgent force and compelled to train as a rebel. The applicant claimed that when he escaped from the guerrillas, they returned to his parents' home and shot and killed his father and mother. The Board had difficulty believing that the applicant was a national native of Sudan. Secondly, they found implausibilities in aspects of his story, for example, the assumption that the persons who killed his parents were rebel forces looking for him after he deserted. While the Court might have reached a different conclusion on

either of these aspects, the panel's findings could not be said to be unreasonable and, therefore, the findings could not be characterized as perverse or capricious or made without regard to the material before the panel. Therefore, the application was dismissed.

*Naikar v. Canada (Min. of Employment & Immigration)*, Fed.T.D., Doc. No. 93-A-120, June 17, 1993.

This was an application for judicial review to set aside a determination of the Convention refugee Determination Division of the IRB that the applicant did not meet the Convention refugee test.

The application was dismissed. The Court noted that on a judicial review application, it must sometimes balance seeming errors in the Board's decision with the more substantive findings the Board has made. To determine whether the errors are of such a nature that, if not committed, the Board's conclusions would have been substantially different, the true test is the reading of the transcript in an attempt to establish whether any purported errors are of a nature to vitiate the ultimate conclusion.

### **INTERIM ORDERS.**

**18.2** On an application for judicial review, the Trial Division may make such interim orders as it considers appropriate pending the final disposition of the application. S.C. 1990, c. 8, s. 5.

### **REFERENCE BY FEDERAL TRIBUNAL — *Reference by Attorney General of Canada.***

**18.3 (1)** A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Trial Division for hearing and determination.

**(2)** The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations thereunder, to the Trial Division for hearing and determination. S.C. 1990, c. 8, s. 5.

### **HEARINGS IN A SUMMARY WAY — *Exception.***

**18.4 (1)** Subject to subsection (2), an application or reference to the Trial Division under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

**(2)** The Trial Division may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action. S.C. 1990, c. 8, s. 5.

*Oduro v. Canada (Min. of Employment & Immigration)* (1993), 73 F.T.R. 191.

The applicant sought permission to proceed by way of an action so that the entire document entitled Consistency Project — Final Report on Meetings, dated May 19, 1992, be put before the Court so that Board members could be questioned on their perception of the document. Judicial review is intended to proceed in a summary manner. Proceeding by way of action pursuant to section 18.4(2) is exceptional and not to be resorted to except in the clearest circumstances. The Court referred to a decision of Pinard J. in *Edwards v. Canada (Minister of Agriculture)*, (1992), 53 F.T.R. 265 at 267, which allowed an application for an injunction and a declaration to be converted into an action in circumstances where counsel submitted there would be many different issues of fact and law, and that in addition there would be a need for extensive cross-examination on the many affidavits filed by both parties. Further, it was argued that the Court should have the benefit of assessing the demeanour and credibility of witnesses under cross-examination, particularly experts. In this case, the applicant referred to censored evidence. The missing portion of the documents in question were deleted pursuant to the provisions of the Access to Information Act. The applicant sought to have the matter treated as an action on the basis of speculation there was further evidence which had been censored which could support the allegation of bias. Such speculation did not constitute a basis upon which the Court could exercise its discretion under section 18.4(2).

### **EXCEPTION TO SECTIONS 18 AND 18.1.**

**18.5** Notwithstanding sections 18 and 18.1, where provision is expressly made by an Act of Parliament for an appeal as such to the Court, to the Supreme Court of Canada, to the Court Martial Appeal Court, to the Tax Court of Canada, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. S.C. 1990, c. 8, s. 5.

## **Judgments of Court of Appeal**

### **POWERS OF COURT OF APPEAL.**

#### **52. The Federal Court of Appeal may**

- (a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever such proceedings are not taken in good faith;
- (b) in the case of an appeal from the Trial Division,
  - (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded,
  - (ii) in its discretion, order a new trial, if the ends of justice seem to require it, or
  - (iii) make a declaration as to the conclusions that the Trial Division should



have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in the light of that declaration; and

- (c) in the case of an appeal other than an appeal from the Trial Division,
  - (i) dismiss the appeal or give the decision that should have been given, or
  - (ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate;
- (d) [Repealed S.C. 1990, c. 8, s. 17.]

*Punnamoorthy v. Canada (Min. of Employment & Immigration)* (1994), 166 N.R. 49 (Fed. C.A.).

The appellant, a citizen of Sri Lanka, was a Tamil who claimed refugee status on the grounds that he had a well-founded fear of persecution by the LTTE. The appellant testified that the EPRLF started forcibly recruiting young men into the Tamil Army. As a result of his standing in the community and long association with the commander of the EPRLF army camp, the appellant was repeatedly asked by parents to obtain their conscripted sons' releases. As a result of his frequent visits to the EPRLF camp, the appellant believed that members of the LTTE thought that he had become a spy or informer. When the LTTE seized control of Jaffna, the appellant was arrested and released after two days in custody. He subsequently fled the country.

The Board offered no reasons for disregarding the appellant's testimony on two of the three grounds upon which it based its decision. Applying the reasoning in *Hilo v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 199, 130 N.R. 236 (Fed. C.A.), the decision of the Board was quashed. This portion of the appeal went on consent. The parties disagreed on whether the Court should exercise its discretion under section 52(c)(i) of the Federal Court Act and declare the appellant a Convention refugee. This decision reviews all of the relevant cases in the last three years on this question.

In order for the Court to exercise its jurisdiction under section 52(c)(i), the evidence on the record must be "so clearly conclusive" that the "only possible conclusion" is that the claimant is a Convention refugee. If the sole issue to be decided involves a pure question of law, which is ultimately decided in favour the claimant, the Court has no difficulty in declaring a claimant to be a Convention refugee. If the issue revolves around uncontroverted evidence and accepted facts upon which a legal conclusion must be drawn, the Court may be compelled to declare a claimant a Convention refugee.

The Court will not invoke section 52(c)(i) when the factual matter involves conflicting evidence which is central to the refugee determination or the claimant's credibility. It is not necessary, however, for the Board to make positive findings of credibility before the Court will exercise its jurisdiction under section 52(c)(i). The Court may exercise its discretion and declare a claimant to be a Convention refugee where the inconsistencies in the testimony, although not insignificant, were not central to the claim.

The weight of authority is that it is highly improbable that a claimant will be declared a Convention refugee by the Court if the Board has made an overall negative assessment with respect to credibility. The same holds true when the Board disbelieves aspects of

the claimant's case which are central or critical to the making of a refugee determination. In this case, the fact that the Court is dealing with matters of credibility critical to the refugee claim is sufficient for it to be cautious in exercising its discretion under section 52(c)(i). Simply because a tribunal falls into error by failing to give adequate reasons for rejecting testimony does not of itself establish the truth of what was said.

The appeal was allowed on consent, the decision of the Board set aside and the matter remitted for rehearing.

*Vakeesan v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-900-90, April 20, 1993.

The Court commented that it would not exercise its jurisdiction under paragraph 52(c) of the *Federal Court Act* because the evidence before the Board was not so clearly conclusive of the issue that the Board ought to declare the appellant a Convention refugee, nor was it clear that such a declaration was the only possible conclusion that the Board could reach. The Court referred to two of its own cases in determining when it would exercise its jurisdiction under paragraph 52(c). Those cases were *Nadarajah v. Canada (Min. of Employment & Immigration)*, [1992] 2 F.C. 394, 17 Imm. L.R. (2d) 1, 142 N.R. 161 (Fed. C.A.) and *Mahathmasseelan v. Canada (Min. of Employment & Immigration)* (1991), 15 Imm. L.R. (2d) 29, 137 N.R. 1 (Fed. C.A.).

# Federal Court Immigration Rules, 1993

**SOR/93-22**

**RULES OF THE FEDERAL COURT OF CANADA  
RESPECTING THE PRACTICE AND PROCEDURE  
FOR APPLICATIONS FOR LEAVE, APPLICATIONS  
FOR JUDICIAL REVIEW AND APPEALS UNDER THE  
IMMIGRATION ACT**

## **Short Title**

1. These Rules may be cited as the *Federal Court Immigration Rules, 1993*.

## **Interpretation**

2. In these Rules,

“Act” means the *Immigration Act*;

“appeal” means an appeal under section 83 of the Act;

“application” means an application to a judge of the Federal Court — Trial Division under subsection 82.1(1) of the Act for leave to commence an application for judicial review of any decision or order made, or any matter arising under the Act, and includes an application for judicial review deemed to have been commenced under subsection 82.1(6) of the Act;

“application for judicial review of a decision of a visa officer” means an application to a judge of the Federal Court—Trial Division referred to in subsection 82.1(2) of the Act;

“Minister” means the Minister of Employment and Immigration, unless the Act provides otherwise;

“tribunal” means the person or body whose decision, order, act or omission is the subject of an application;

“written reasons” includes a transcript of reasons given orally.

## **Application**

3. (1) These Rules apply to applications and appeals which are commenced after the coming into force of sections 73, 114, 115, 116, 117 and 118 of *An Act to amend the Immigration Act and other Acts in consequence thereof*, chapter 49 of the Statutes of Canada, 1992.

(2) Part V.1 of the *Federal Court Rules* and Rule 18 of these Rules apply to applications for judicial review of a decision of a visa officer.

4. (1) Except to the extent that they may be inconsistent with the Act or



these Rules, Parts I, II and III, Divisions A and B of Part V, and Part VI of the *Federal Court Rules* apply to applications and appeals.

(2) Except to the extent that they may be inconsistent with the Act, Part V.1 of the *Federal Court Rules* or Rule 18 of these Rules, Parts I, II, III and VI of the *Federal Court Rules* apply to applications for judicial review of a decision of a visa officer.

*Lisovenko v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-6411-93, April 26, 1994.

The applicants sought to set aside a decision of the Court dismissing their application for leave due to their failure to take the steps required to perfect their application. The applicants alleged that their former solicitor had failed to file their application record on time and failed to subsequently take steps to remedy his failure to file. They alleged that they were unaware of their solicitor's failure to act until they received a copy of the Court's decision. They retained new counsel and now moved for leave.

The basis for the motion was that the solicitor's failure to act constituted a subsequently discovered fact or matter within the meaning of Rule 1733. Rule 1733 provides for an extraordinary and exceptional measure. It is incumbent upon a party who seeks this relief to act with diligence. Where delays are encountered, they must be reasonably explained. Sheer procrastination is a bar to relief.

The evidence in support of this application failed to explain the delay between the time that the applicants were informed that their former solicitor had declined to take any steps to remedy his alleged failure to file and the moment when the applicants' new solicitor was retained to file the present application. Accordingly, the application was dismissed.

*Mongkondow v. Canada (Solicitor General)*, Fed. T.D., Doc. No. IMM-6911-93, April 14, 1994.

This was a motion for an order compelling the respondent to disclose the contents of the applicant's immigration file to her solicitor. The applicant had applied for leave to seek judicial review of a decision of an immigration supervisor, refusing to find sufficient humanitarian and compassionate grounds to warrant processing the applicant's application for landing from within Canada. The application for leave had been perfected and was presently before the Court. In the interim the applicant brought this motion to obtain complete disclosure of her file, arguing that such disclosure was essential for her to be able to argue her case.

The applicant's solicitor had submitted a formal request for information pursuant to the Privacy Act [S.C. 1980-81-82-83, c. 111, Sch. II "1"] on December 16, 1993 and followed it with a letter undertaking not to disclose the contents of the file to anyone, including the applicant. The respondent's privacy coordinator provided the applicant's solicitor with certain portions of the file, however, certain other portions were not disclosed. This motion was filed in an effort to obtain full disclosure of the file.

The Privacy Act spells out the procedure which must be followed when seeking disclosure of information contained in a government file. Disclosure must first be requested in writing pursuant to sections 12 and 13. If the government institution decides not to disclose, the individual may file a formal complaint with the Privacy Commissioner

pursuant to section 29. The Commissioner then investigates the claim and makes recommendations to the institution. It is only then that the individual can apply to the Court for judicial review of the government's refusal to disclose. Section 41 of the Act is explicit and authorizes Court intervention only following an investigation by the Commissioner. In the case at bar, no such investigation having taken place, the motion was therefore premature and dismissed.

*Wang v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-7479-93, April 13, 1994.

This motion for an extension of the time to file a reply was granted. The application record was served on the 7th of February. A response should have been anticipated by the end of the first week in March and a reply would have to have been filed before the third week in March. The applicant's counsel left the country on the 1st of March and remained out of the office until the 28th and thus could not deliver a reply within the time required by the Rules. The Court did not subject the clients to the natural consequences of counsel's casual disregard of the requirements of the Rules and extended the time to file a reply. Reference was made to *Ansary v. Canada (Min. of Employment & Immigration)* (1993), 66 F.T.R. 218.

*Sitsabeshan v. Canada (Min. of Employment & Immigration)* Fed. T.D., Doc. No. IMM-1014-93, March 28, 1994.

The applicants sought to reverse an order of the Court which denied them leave to seek judicial review of a negative decision of their refugee claim.

Rule 1733 permits the Court to reverse or vary an order where the following three pre-conditions are met:

1. there must be new and relevant matter discovered subsequent to the issuance of the original order;
2. this must be matter which could not with reasonable diligence have been discovered sooner; and
3. the Court would have to be satisfied that there would have been a different disposition of the original application if the new and relevant matter had been before the Court.

The Court is not disposed to order reconsideration except in the most exceptional circumstances. They were found to exist in this case. The applicants relied on their former solicitor to file material with respect to the leave application and to do so in a timely fashion. They only became aware of the solicitor's failure when they received news of the negative determination. The applicants then retained a new solicitor who promptly brought this application.

Upon reviewing the new material filed, the Court was satisfied that the applicants had an arguable case and an order went reversing the decision refusing leave.

*Moutisheva v. Canada (Min. of Employment & Immigration)*, Fed. C.A., Doc. No. A-808-91, September 29, 1993, leave to appeal to S.C.C. refused, Doc. No. 23884, April 21, 1994.

This was an application made pursuant to Rule 1733 of the Federal Court Rules to set aside a judgment dismissing the applicant's appeal. The judgment was rendered

pursuant to an application to dismiss made under Rule 1308 due to undue delay by the applicants in prosecuting their appeal.

Rule 1308 clearly establishes that ten days' notice of intention to file a motion to dismiss must be given to the appellant or his counsel. Where the rules do not specifically require personal service and where a party decides to be represented by counsel and that counsel is entered on the record, service at the address of counsel's office constitutes valid service.

The security and efficacy of legal proceedings requires that a final judgment, capable of taking effect as *res judicata*, is in principle irrevocable and cannot lightly be overturned. Any application to set aside a judgment under Rule 1733 is exceptional in nature and must be brought with reasonable diligence. The applicants, in this case, did not demonstrate reasonable diligence due to the fact that approximately four months elapsed between the time they learned of the dismissal of their appeal and the obtaining of new counsel and the seeking of the instant application. Accordingly, the application was dismissed.

*Nguyen v. Canada (Min. of Employment & Immigration)* (1993), 66 F.T.R. 75, [1994] 1 F.C. 96, 107 D.L.R. (4th) 186.

The applicant filed an application for leave to challenge a decision of the CRDD denying the applicant refugee status. The applicant obtained a letter from the official reporter of the Board disclosing that no official transcript of the proceedings had been prepared and questioning the accuracy of the Board's quotations of the evidence. The letter from the official reporter was included in the applicant's record. The respondent Minister took the position that there was no evidence that the portions of the testimony quoted were inaccurate. The applicant filed a reply memorandum to which was attached, under cover of an affidavit of the official reporter, a transcript of the proceedings. The respondent Minister objected to the filing of the transcript in reply.

Federal Court Immigration Rule 13 states that an applicant may file a memorandum of argument in reply, but it does not specifically state no other material may be filed. Federal Court Immigration Rule 4(1) provides that Part I, and other parts of the Federal Court Rules, apply to immigration applications, except to the extent that they are inconsistent with the Federal Court Immigration Rules. Federal Court Rules 5 and 6 are sufficient authority for the granting of leave to the applicant to file a copy of the official transcript under cover of the affidavit of the official reporter. In addition, Federal Court Immigration Rule 14(2) provides authority to direct the filing of the transcript.

*Ballie v. Canada (Min. of Employment & Immigration)* (1993), 101 D.L.R. (4th) 761 (Fed. T.D.).

Rule 1909 of the Federal Court Rules is not meant to apply to a stay of an exclusion order issued by Employment and Immigration Canada. Rule 1909 applies to judgments or orders of the Federal Court of Canada and to decisions made by the respondent.

The Federal Court of Canada has jurisdiction to grant a stay pursuant to its inherent jurisdiction in deciding issues relating to applications for leave pursuant to section 82.1 of the Immigration Act and not pursuant to Federal Court of Canada Rule 1909.



*Abdi v. Canada (Min. of Employment & Immigration)* (1992), 145 N.R. 255 (Fed. C.A.).

This was a motion for reconsideration of an order made by the Court dismissing an application for leave to appeal. Under the previously existing legislation the applicant had applied for leave to appeal a decision of the C.R.D.D. dismissing his claim for Convention refugee status, which application for leave had been dismissed by order of the Court, which order had prompted this motion for reconsideration. In order to obtain this type of relief, an applicant must establish that a new matter was discovered subsequent to the judgment impugned, that the new matter could not with reasonable diligence have been discovered sooner and that the new matter is of such character that if it had been brought forward in the action, it would have altered the judgment of the Court. In this particular case, the applicant being unable to show reasonable diligence, the application for reconsideration was dismissed.

*Sangar v. Canada (Min. of Employment & Immigration)* (1992), 55 F.T.R. 97 (T.D.).

The applicant obtained leave to commence a section 18 application in staying a deportation order without the respondent Minister having an opportunity to be heard on the matter. This failure to hear the respondent occurred either through mistake or inadvertence and accordingly, Rule 330 of the Federal Court Rules gave the Court jurisdiction to rescind the order. In this particular case, having regard to the materials subsequently filed by the respondent, it was clear that the orders in question ought not to have been made and accordingly, pursuant to Rule 330, the order granting leave and the order staying the execution of the deportation order in question were rescinded in their entirety.

*Boateng v. Canada (Min. of Employment & Immigration)* (1990), 11 Imm. L.R. (2d) 9, 112 N.R. 318 (Fed. C.A.).

The applicant applied for leave to commence a proceeding under section 28 of the Federal Court Act in respect of a determination, dated March 7, 1990, that he did not have a credible basis for his claim to be a Convention refugee. In the notice of motion he applied for an extension of time to file the affidavit required by rule 9(1) of the Federal Court Immigration Rules. He did not suggest the grounds upon which the extension of time was required and, on March 28, application for an extension of time was dismissed. On April 3, 1990, the applicant applied for reconsideration of that order on the grounds that the paragraphs stating the applicant's reasons for requesting the extension of time had been accidentally omitted. The failure of a party to include available material does not give rise to jurisdiction to reconsider a decision finally disposing of a matter. Jurisdiction to reconsider is contemplated by rule 337 where the oversight is that of the Court and not a party. Further, the oversight in question does not fall within rule 1733 thus the Court is without jurisdiction to reconsider the decision refusing an extension of time.

*Canada (Min. of Employment & Immigration) v. Bhatnager*, [1992] 2 S.C.R. 217, 44 Admin. L.R. 1, 43 C.P.C. (2d) 213, 12 Imm. L.R. (2d) 81, 36 F.T.R. 91 (note), 111 N.R. 185, 71 D.L.R. (4th) 84.

The respondent, Bhatnager, sought a writ of *mandamus* to compel the Minister to process the application for landing of her husband, an Indian citizen living in India. There had been, to the time of her application, a delay of almost 5 years in processing the respondent's husband's application.

Prior to hearing the respondent's motion, an affidavit of an immigration officer was filed on behalf of the Minister. On July 11, 1985, in the course of cross-examination on that affidavit, counsel for the Minister agreed to produce the Ministry's New Delhi file. The hearing of the application was adjourned until September 3, 1985. Several telexes were sent to New Delhi requesting the file but over a month passed with no sign of it. The respondent brought two motions: the first adding the Secretary of State for External Affairs as a party respondent and the second ordering production of the New Delhi file. Both motions were granted on August 15, 1985 in open court and in the presence of counsel for the appellants. Part of the formal order required production of the file and sufficient time for the cross-examinations to be completed in time for the scheduled hearing on September 3, 1985. On August 20, 1985, a copy of the order was served on the appellant's solicitor by the respondent's solicitor. There is no evidence that the order was served on either of the appellants or that they were informed of its existence. On August 26, 1985, counsel for the parties agreed to continue the cross-examination of the appellant's representative on August 29 on the assumption that the file or a copy of it would be available. Counsel for the respondent received what purported to be a copy of the file on August 27, 1985 but in the course of the cross-examination it was discovered that several relevant documents were missing. In the meantime, the original file had arrived in Ottawa by diplomatic bag on August 28, 1985. For some reasons which were not explained in evidence, the file did not arrive in Toronto until August 30, 1985, the last business day before the hearing of the respondent's application for *mandamus*. The respondents were cited for contempt and the motion for *mandamus* was granted. The respondents were acquitted of contempt at the trial division. The Federal Court of Appeal overturned this decision and found the appellants guilty of contempt and remitted the matter to the trial Judge for assessment of penalty. The appellant Ministers appealed to the Supreme Court of Canada which allowed the appeal and found the appellants not guilty of contempt. The Court noted that an allegation of contempt of court is a matter of criminal dimension. A finding of guilt could have subjected the appellants to a fine of as much as \$5,000 and the possibility of imprisonment to a maximum of 1 year. Common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. A finding of knowledge on the part of the client may be, in some circumstances, inferred from the fact that the solicitor for the client was informed of the order. In the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments, it would be extraordinary if orders were brought routinely to their attention. In order to infer knowledge from service upon the Minister's solicitor, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister. Knowledge, in most cases, is proved circumstantially and in contempt cases, the inference of knowledge will always be available where facts capable of supporting the inference are proved.

Ministers will not be able to hide behind lawyers so as to flout orders of the court. Any instructions to the effect that the Minister is to be kept ignorant may attract liability on the basis of the doctrine of wilful blindness. Furthermore, a Minister of the Crown cannot be confident in any given case that the inference will not be drawn and hopefully this will serve as a sufficient incentive for the Minister to see to it that officials are impressed with the importance of complying with court orders.

### **Form of Application**

**5. (1) An application shall be in accordance with Form IR-1 as set out in the schedule and shall set out**

- (a) the full names of the parties;**
- (b) the date and details of the decision, order or other matter in respect of which relief is sought;**
- (c) the name of the tribunal and, if the tribunal was composed of more than one person, the name of each person who was on the tribunal;**
- (d) the tribunal's file number, if any;**
- (e) the precise relief to be sought on the application for judicial review;**
- (f) the grounds on which the relief is sought, including a reference to any statutory provision or Rule to be relied on;**
- (g) the proposed place and language of the hearing of the application for judicial review;**
- (h) whether or not the applicant has received the written reasons of the tribunal; and**
- (i) the signature, name, address and telephone number of the individual solicitor filing the application, or where the applicant acts in person, his or her signature, name, address for service in Canada, and telephone number.**

**(2) Unless the Minister is the applicant, the Minister shall be a respondent in an application.**

### **Extension of Time to File and Serve Application**

**6. (1) Where an extension of time under subsection 82.1(5) of the Act is required, the applicant shall apply for the extension of time in the application for leave.**

**(2) A request for an extension of time under subsection 82.1(5) of the Act shall be determined at the same time, and on the same materials, as the application for leave.**

*Chin v. Canada (Min. of Employment & Immigration)* (1993), 22 Imm. L.R. (2d) 136, 69 F.T.R. 77.

On September 1, 1993 the applicant sought an extension of time for filing the application record. On July 28, 1993 he had filed an application for leave. The application record, according to the rules, was required to be filed before August 27, 1993. The



application for an extension of time was filed on August 20, 1993. The reason given for seeking an extension was because counsel was going out of town from August 21 to August 27 and was unable to complete the application record. The application for an extension of time was refused. The time limits set out in the rules are meant to be complied with. If they are too short, then requests should be made to have the rules amended. Extensions are not granted because it is the first time that counsel was asked for one or because the work load which counsel has assumed is too great. In order for an application to be successful some reason for the delay, which is beyond the control of counsel or the applicant, must be given, for example, illness or some other unexpected or unanticipated event. There was no such unanticipated delay in the present case. Courts are often reluctant to disadvantage individuals because their counsel missed deadlines. In matters of this nature, however, counsel is acting in the shoes of his or her client. Client and counsel are one for such purposes. It is too easy a justification for non-compliance with the rules for counsel to say the delay was not in any way caused by the client and if an extension is not granted the client will be prejudiced.

The comments of the Court occurred when counsel, after having been apprised of the Court's refusal to extend the time, filed a motion for reconsideration. Such a motion is filed pursuant to Rule 337(5). The Court declined the motion for reconsideration. There was no oversight on the part of the Court respecting the evidence. Accordingly, the motion for reconsideration was dismissed.

*Espinoza v. Canada (Min. of Employment & Immigration)* (1992), 142 N.R. 158 (Fed. C.A.).

An order for an extension of the time to comply with Rule 9 does not finally dispose of any matter and issue. Such an order is always open to reconsideration whether made peremptorily or not. The policy of the Immigration Act and Federal Court Immigration Rules is transparently clear and is one of deciding leave applications expeditiously. The dilatory initiation of Legal Aid applications, delays in providing opinion letters, which counsel know will be required, and the ever slower processing of such applications by Legal Aid cannot be permitted to defeat the policy of the Act and Rules. Failure to make a Legal Aid application promptly can be good reason to deny an extension.

*Kazi v. Kalusny* (1991), 13 Imm. L.R. (2d) 258 (Fed. T.D.).

Counsel sought an extension of the time limits provided by section 9 of the rules. One of the basis for the request was that counsel had occupied himself with a long-standing client who was in a more difficult situation than the applicants. The extension was refused. Counsel had an obligation to delegate the file to someone else or to make sure, in some other manner, that the deadlines which apply to these clients were met. With respect to the main motion for leave to commence a proceeding, it was dismissed. There was no material on the file to support the application for leave.

*Bains v. Canada (Min. of Employment & Immigration)* (1990), 47 Admin. L.R. 317, 109 N.R. 239 (Fed. C.A.).

The only question to be considered in disposing of an application for leave under section 82.1(1) or 82.3(1) is whether or not a fairly arguable case is disclosed for the relief proposed to be sought if leave is granted. Further, the need for material not immediately available has to be established by the applicant and the mere stated intention

to rely on such material does not, without an application and an order to that end, operate to extend the time provided by the Federal Court Immigration Rules for the applicant to file an affidavit and/or representations in support of the leave application. The requirement for leave is, in reality, the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that disclose no reasonably arguable case. The requirement for leave does not deny refugee claimants access to the court. The right to apply for leave is, itself, a right of access to the court and the requirement that leave be obtained before an appeal or application for judicial review may proceed does not impair the right guaranteed by refugee claimants under either sections 7 or 15 of the Charter.

### **Filing and Service of Application**

**7. (1) An application shall be filed, and a certified copy of it served on all parties, within 15 days after the day on which the applicant is notified of the decision or order or becomes aware of the other matter in respect of which relief is sought.**

**(2) Proof of service of an application on the other parties shall be filed within 10 days after the application is served.**

#### ***Subsection (1)***

*Dhillon v. Canada (Min. of Employment & Immigration)* (1992), 17 Imm. L.R. (2d) 156, 144 N.R. 67 (Fed. C.A.).

The applicant sought to extend the deadline imposed by section 12(1) of the Federal Court Immigration Rules. The 15-day deadline imposed by section 82.3(4) expired on April 9 and the applicant filed his application on April 9; however, the application was not served until April 16. Section 12(1) of the Rules is quite clear. A party filing the document has the same time in which to serve it as he had in which to file it. The practice of the court requiring that a document be filed before it can be served complicates the life of a party who waits to the last day before filing the document and exposes that party to the risk that the document he has just filed will not be served on that day. This risk is especially acute when the party on which the document must be served does not live in the city where there is a registry of the court. Section 12(2), which gives the parties five days from the date of service to file proof of service, is no help. That section only applies to proof of service made at the proper time and is intended to enable the court not only to check that there has been service, but also to insure that the service was made in due form and at the proper time.

In this particular case the applicant had acted with due diligence and the Court granted an extension of time for serving the document.

### **Notice of Appearance**

**8. (1) A respondent who is served with an application shall serve a notice of appearance in accordance with Form IR-2 as set out in the schedule on the applicant and the tribunal, and file it, together with proof of service, within 10 days after service of the application.**

(2) A respondent who has failed to file a notice of appearance in accordance with subrule (1) shall not be entitled to any further notice or service of any further document in the proceeding.

#### Obtaining Tribunal's Decision and Reasons

9. (1) Where an application sets out that the applicant has not received the written reasons of the tribunal, the Registry shall forthwith send the tribunal a written request in Form IR-3 as set out in the schedule.

(2) Upon receipt of a request under subrule (1) a tribunal shall, without delay,

(a) send a copy of the decision or order, and written reasons therefor, duly certified by an appropriate officer to be correct, to each of the parties, and two copies of the Registry; or

(b) if no reasons were given for the decision or order in respect of which the application is made, or reasons were given but not recorded, send an appropriate written notice to all the parties and the Registry.

(3) A tribunal shall be deemed to have received a request under subrule (1) on the tenth day after it was sent by mail by the Registry.

(4) The applicant shall be deemed to have received the written reasons, or the notice referred to in paragraph 9(2)(b), as the case may be, on the tenth day after it was sent by mail by the tribunal.

#### Perfecting Application for Leave

10. (1) The applicant shall perfect an application for leave by complying with subrule (2)

(a) where the application sets out that the applicant has received the tribunal's written reasons, within 30 days after filing the application; or

(b) where the application sets out that the applicant has not received the tribunal's written reasons, within 30 days after receiving either the written reasons, or the notice under paragraph 9(2)(b), as the case may be.

(2) The applicant shall serve on every respondent who has filed and served a notice of appearance, a record containing the following, on consecutively numbered pages, and in the following order

(a) the application for leave,

(b) the decision or order, if any, in respect of which the application is made,

(c) the written reasons given by the tribunal, or the notice under paragraph 9(2)(b), as the case may be,

(d) one or more supporting affidavits verifying the facts relied on by the applicant in support of the application, and

(e) a memorandum of argument which shall set out concise written sub-



**missions of the facts and law relied upon by the applicant for the relief proposed should leave be granted,**  
**and file it, together with proof of service.**

### ***Subsection (2)***

*Koulibaly v. Canada (Solicitor General)*, Fed. T.D., Doc. No. IMM-5609-93, November 18, 1993.

The Court granted an order permitting the applicant to serve and file the applicant's record outside the time allowed under section 10(2) of the Immigration Rules of the Federal Court. In support of the motion, the applicant filed the affidavit of his counsel stating that he had been unable to contact the applicant within the time required. It would have been preferable to file the affidavit of the applicant himself, on this question, stating in the affidavit that the applicant had not been available.

*Metodieva v. Canada (Department of Employment & Immigration)* (sub nom. *Metodieva v. Ministre de l'emploi et de l'immigration*) (1991), 132 N.R. 38 (Fed. C.A.).

The Convention Refugee Determination Division dismissed the applicant's claim for refugee status. An initial application for leave to appeal was dismissed in December 1990. In May 1991, the applicant made a subsequent application for a leave to appeal and for an extension of the 15-day deadline imposed by section 82.3(4) of the Immigration Act. This application was a request to the Court to disregard the final order made by the Court previously refusing leave to appeal. Once an order has been signed by a judge, it is a final order. Apart from clerical mistakes or errors arising from accidental slips or omissions, a party who is not satisfied with such an order may only challenge the order in a manner prescribed by the Federal Court Act or by the Rules of the Court and, in immigration matters, by the Immigration Act and the Federal Court Immigration Rules. Further, in immigration matters, no appeal lies to the Supreme Court of Canada from a judgment of a Federal Court of Appeal judge on an application for leave to commence proceedings or an application for leave to appeal.

The proceedings defined by the Rules of Court are also available to a dissatisfied party. These proceedings are an application to rehear a motion dismissed in the absence of a party, an application to rescind an order made *ex parte* or, in the absence of a party, an application to reconsider the terms of the pronouncement on the grounds (a) that the pronouncement does not accord with the reasons that were given or (b) that some matter that should have been dealt with has been overlooked or accidentally omitted, an application for a rehearing under Rule 1103(3), or an application setting aside a judgment for a new matter or fraud (Rule 1733). Apart from these cases, the Court does not have jurisdiction to reconsider a final order. In the case at bar, the original order dismissing the application for leave to appeal was based on the fact that the application was unsupported by affidavit or other material. The fact that an application was dismissed for a procedural defect does not in any way change the fact that the order made is final and not subject to reconsideration except in the allowable cases referred to above. The absence of an affidavit is a substantive defect as well as a procedural one. Rule 9(1) of the Federal Court Immigration Rules makes the filing of an affidavit

an integral part of an application, and an application for leave not supported by an affidavit is not complete and cannot be allowed by the Court. The fact that the applicant is a foreigner in Canada does not confer any privilege to be ignorant of Canadian law or any special status in respect of errors which may be made by one's counsel. Accordingly, the application for leave to appeal was dismissed.

### **Respondent's Affidavits and Memorandum of Argument**

#### **11. A respondent who opposes an application**

- (a) may serve on the other parties one or more affidavits, and**
- (b) shall serve on the other parties a memorandum of argument which shall set out concise written submissions of the facts and law relied upon by the respondent,**

**and file them, together with proof of service, within 30 days after service of the documents referred to in subrule 10(2).**

### **Affidavits**

**12. (1) Affidavits filed in connection with an application shall be confined to such evidence as the deponent could give if testifying as a witness before the Court.**

**(2) Unless a judge for special reasons so orders, no cross-examination of a deponent on an affidavit filed in connection with an application is permitted before leave to commence an application for judicial review is granted.**

#### **Subsection (2)**

*Kanes v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. IMM-1918-93, August 4, 1993.

The applicant brought an interlocutory motion in the course of prosecuting an application for leave seeking permission to cross-examine one Lalita Jeethan on an affidavit she filed on the leave application.

The applicant alleged that there were inaccuracies in the affidavit. The inaccuracies in this case could not be clarified further by cross-examination. The answer, if any, must be found in the documentary evidence attached to the affidavit, namely the applicant's application for permanent residence wherein he answered "No" to the question of "Have you . . . ever been convicted of or currently charged with any crime or offence . . ." Further, the deponent, Jeethan, claimed no personal involvement in the handling of the file; therefore, the Court could not appreciate how it would be further enlightened by her cross-examination. On the question of when documents were received by the Commission, this issue would be resolved better, the Court felt, by examining the document.

Finally, the Court noted that a judge dealing with an application for leave is not required to make factual findings, but simply to determine whether a serious issue has been raised. The application for leave process is designed to provide a relatively simple and speedy process for the Court to determine whether there is a serious question that

should be dealt with by a normal judicial review process. Judges are not expected to make findings of fact or resolve conflicts in the evidence at that stage.

The Court declined to order costs against the applicant in this case because this was a matter of first impression. It did indicate, however, that it would consider ordering costs where future interlocutory motions were brought on such an insubstantial basis.

### **Reply Memorandum**

**13. Where a respondent serves a memorandum of argument, an applicant may serve a memorandum of argument in reply thereto, and shall file it, together with proof of service, within 10 days after the day of service of the respondent's memorandum of argument.**

### **Disposition of Application for Leave**

#### **14. (1) Where**

**(a) any party has failed to serve and file any document required by these Rules within the time fixed, or**

**(b) the applicant's reply memorandum has been filed, or the time for filing it has expired,**

**a judge may, without further notice to the parties, determine the application for leave on the basis of the materials then filed.**

**(2) Where the judge considers that documents in the possession or control of the tribunal are required for the proper disposition of the application for leave, the judge may, by order, specify the documents to be produced and filed and give such other directions as the judge considers necessary to dispose of the application for leave.**

**(3) The Registry shall send to the tribunal a copy of an order made under subrule (2) forthwith after it is made.**

**(4) Upon receipt of an order under subrule (2), the tribunal shall, without delay, send a copy of the materials specified in the order, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry.**

**(5) The tribunal shall be deemed to have received a copy of the order on the tenth day after it was sent by mail by the Registry.**

*Nguyen v. Canada (Min. of Employment & Immigration)* (1993), 66 F.T.R. 75, [1994] 1 F.C. 96, 107 D.L.R. (4th) 186.

The applicant filed an application for leave to challenge a decision of the CRDD denying the applicant refugee status. The applicant obtained a letter from the official reporter of the Board disclosing that no official transcript of the proceedings had been prepared and questioning the accuracy of the Board's quotations of the evidence. The



letter from the official reporter was included in the applicant's record. The respondent Minister took the position that there was no evidence that the portions of the testimony quoted were inaccurate. The applicant filed a reply memorandum to which was attached, under cover of an affidavit of the official reporter, a transcript of the proceedings. The respondent Minister objected to the filing of the transcript in reply.

Federal Court Immigration Rule 13 states that an applicant may file a memorandum of argument in reply, but it does not specifically state no other material may be filed. Federal Court Immigration Rule 4(1) provides that Part I, and other parts of the Federal Court Rules, apply to immigration applications, except to the extent that they are inconsistent with the Federal Court Immigration Rules. Federal Court Rules 5 and 6 are sufficient authority for the granting of leave to the applicant to file a copy of the official transcript under cover of the affidavit of the official reporter. In addition, Federal Court Immigration Rule 14(2) provides authority to direct the filing of the transcript.

### **15. (1) An order granting an application for leave**

- (a) shall fix the place and language, and a day that is no sooner than thirty days and no later than ninety days after the date of the order, for the hearing of the application for judicial review;**
- (b) shall specify the time limit within which the tribunal is to send copies of its record required under Rule 17;**
- (c) shall specify the time limits within which further materials, if any, including affidavits, transcripts of cross-examinations, and memoranda of argument are to be served and filed;**
- (d) shall specify the time limits within which cross-examinations, if any, on affidavits are to be completed; and**
- (e) may specify any other matter that the judge considers necessary or expedient for the hearing of the application for judicial review.**

**(2) The Registry shall send to the tribunal a copy of an order granting leave forthwith after it is made.**

**(3) The tribunal shall be deemed to have received a copy of the order on the tenth day after it was sent by mail by the Registry.**

**16. Where leave is granted, all documents filed in connection with the application for leave shall be retained by the Registry for consideration by the judge hearing the application for judicial review.**

### **Obtaining Tribunal's Record**

**17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:**

- (a) the decision or order in respect of which the application is made and the written reasons given therefor,**

- (b) all papers relevant to the matter that are in the possession or control of the tribunal,
- (c) any affidavits, or other documents filed during any such hearing, and
- (d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

*Lemiecha v. Canada (Min. of Employment & Immigration)* (1993), 72 F.T.R. 49.

This was an application to review a decision that there were no humanitarian or compassionate grounds to permit the applicants to remain in Canada. The applicants were a married couple and their two children. They arrived in Canada during the summer and autumn of 1989. They claimed Convention refugee status and these claims were denied in August, 1990. In April, 1991, through a solicitor, they applied for a review on humanitarian and compassionate grounds. A medical update on their nine-year old son was completed in September, 1991 but not forwarded to the Immigration Centre. Without either of the medical reports having been brought to their attention, through no fault of the respondent, the humanitarian and compassionate review resulted in a negative decision. A further review was conducted on the eve of what was to be the applicants' departure for Poland. One of the medical reports that had been prepared with respect to the son was forwarded to the officer conducting that review. The officer, after seeking advice from a Canada Immigration physician, refused a humanitarian and compassionate relief and it was that decision that was the subject of this application.

The application failed. The applicants were aware of their nine-year old son's medical condition and its relevance to a humanitarian and compassionate review. The applicants had many months to supply information regarding medical expertise, services and facilities available in Poland and environmental conditions in that country and their relationship to the son's asthmatic condition. The applicants did not submit this information.

Judicial review of a decision of a federal board, commission or other tribunal should proceed on the basis of the evidence that was before the decision maker. Accordingly, the evidence of the medical experts which was tendered on the judicial review application but not submitted to the officer whose decision was under attack, was not admissible. There was essentially no evidence before the officer whose decision was under attack regarding any link between conditions in Poland, environmental or otherwise, and the nine-year old son's medical difficulties. Accordingly, the application for judicial review was dismissed.

### **Disposition of Application for Judicial Review**

**18. (1) A judge shall not render judgment in respect of an application for judicial review without first giving the parties an opportunity to make a request that the judge certify that a serious question of general importance as contemplated by section 83 of the Act is involved.**

(2) A party who requests that the judge certify that a serious question of general importance is involved shall specify the precise question.

(3) For the purposes of this Rule, an application for judicial review includes an application for judicial review of a decision of a visa officer.

### Appeals

19. Notwithstanding the Rules contained in Divisions A and B of Part V of the *Federal Court Rules*, the Chief Justice of the Federal Court or a judge designated by the Chief Justice may, at any time, by motion or on the initiative of the Chief Justice or of the judge designated

- (a) establish time limits for the filing of documents;
- (b) fix the day, time and place for the hearing of the appeal; and
- (c) give such directions as the Chief Justice or the judge designated considers appropriate for the purpose of expediting the hearing of the appeal.

20. (1) An appeal to the Court of Appeal shall be commenced by filing a notice of appeal in Form IR-4 as set out in the schedule within

- (a) 15 days after the pronouncement of the judgment under appeal; or
- (b) such further time as may be ordered by a judge of the Federal Court—Trial Division.

(2) A notice of appeal shall be served on all parties and proof of service filed within 15 days after the notice of appeal is filed.

### Time Limits

21. (1) The time of the Long Vacation, but not the Christmas Vacation, shall be reckoned in the calculation of the time limits prescribed by these Rules.

(2) No time limit prescribed by these Rules may be varied except by order of a judge or prothonotary.

### Subsection (2)

*Subuncuo v. Canada (Min. of Employment & Immigration)*, Fed. T.D., Doc. No. 92-T-1555, December 4, 1992.

The respondent Minister sought an order extending the time within which the respondent would be allowed to file and serve written submissions in response to the applicant's application for leave pursuant to section 82.1. The adjudicator in this case had delayed in forwarding a copy of the transcript of the hearing and this delay was determined not to be justifiable. In requesting an extension of time in such a situation, the respondent is essentially using its own conduct as a ground for delay — something an applicant would not be allowed to do. There are no good reasons why tapes could not be used to avoid the delay which arises as a result of waiting for the preparation of a transcript. In this case, however, the applicant had requested a transcript and not



a copy of the tape and, accordingly, an extension of time was granted. The result would have been different had the applicant requested a copy of the tape rather than a transcript.

*Espinoza v. Canada (Min. of Employment & Immigration)* (1992), 142 N.R. 158 (Fed. C.A.).

An order for an extension of the time to comply with Rule 9 does not finally dispose of any matter and issue. Such an order is always open to reconsideration whether made peremptorily or not. The policy of the Immigration Act and Federal Court Immigration Rules is transparently clear and is one of deciding leave applications expeditiously. The dilatory initiation of Legal Aid applications, delays in providing opinion letters, which counsel know will be required, and the ever slower processing of such applications by Legal Aid cannot be permitted to defeat the policy of the Act and Rules. Failure to make a Legal Aid application promptly can be good reason to deny an extension.

*Bains v. Canada (Min. of Employment & Immigration)* (1990), 47 Admin. L.R. 317, 109 N.R. 239 (Fed. C.A.).

The only question to be considered in disposing of an application for leave under section 82.1(1) or 82.3(1) is whether or not a fairly arguable case is disclosed for the relief proposed to be sought if leave is granted. Further, the need for material not immediately available has to be established by the applicant and the mere stated intention to rely on such material does not, without an application and an order to that end, operate to extend the time provided by the Federal Court Immigration Rules for the applicant to file an affidavit and/or representations in support of the leave application. The requirement for leave is, in reality, the other side of the coin of the traditional jurisdiction to summarily terminate proceedings that disclose no reasonably arguable case. The requirement for leave does not deny refugee claimants access to the court. The right to apply for leave is, itself, a right of access to the court and the requirement that leave be obtained before an appeal or application for judicial review may proceed does not impair the right guaranteed by refugee claimants under either sections 7 or 15 of the Charter.

### Costs

**22. No costs shall be awarded to or payable by any party in respect of an application or an appeal under these Rules unless the Court, for special reasons, so orders.**

### Fees

**23. A fee of \$50 shall be paid to the Registry in order to file an application or a notice of appeal.**

### Coming into force

**24. These Rules shall come into force on the day on which sections 73, 114, 115, 116, 117 and 118 of *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, come into force.**

*Hassan v. Canada (Min. of Employment & Immigration)* (1993), 151 N.R. 215 (Fed. C.A.).

Pursuant to the legislation then in effect the appellants appealed with leave of a judge of the Federal Court of Appeal against a negative decision of the Refugee Division. After leave was obtained and a package of materials received from the Board pursuant to Rules 1305 and 1306(1), counsel for the appellants moved, pursuant to Rule 324, to vary the appeal book to include the standardized country file relied on by the Refugee Division. The Board showed cause why the standardized country file should not be produced. It was held that the Board had acted properly in not producing the whole of the contents of its standardized country files. Section 68 makes it quite plain that Parliament has extended the concept of judicial notice for the Board well beyond what is normally understood. Published information relating to conditions in countries from which refugee claimants come is precisely the type of “information or opinion” that may be expected within the specialized knowledge of the Board. By making this information publicly available and by referring to the then current index at the outset of the hearing, the Board has adequately complied with the notice requirements of subsection 68(5). To the extent that such material has not been specifically referred to by the Board in its reasons, it need not be produced. A party who asks the Court to act on this material in the same way that the Board might have done must bring this material to the attention of the Court. The most convenient method of doing this is for the party to reproduce copies of the document of which it wishes the Court to take notice and annex it to the memorandum of fact and law. It is not appropriate as a matter of routine to encumber the appeal book with material which is likely to be voluminous and which will in most cases have little or no relevance to the issues raised. The application to vary the appeal book was dismissed.

## SCHEDULE

### Form IR-1 (Rule 5)

Registry No.

### FEDERAL COURT OF CANADA TRIAL DIVISION

Between:

*[Insert full name of party]*  
*or The Minister of Employment and Immigration*

Applicant(s)

and

*The Minister of Employment and Immigration*  
*[or full name of other party if the Minister is the Applicant]*

Respondent(s)

**APPLICATION FOR LEAVE  
and for JUDICIAL REVIEW**

**TO THE RESPONDENT(S)**

**AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW UNDER S. 82.1 OF THE *IMMIGRATION ACT* has been commenced by the applicant.**

**THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with subsection 82.1(4) of the *Immigration Act*.**

**IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must forthwith prepare a Notice of Appearance in Form IR-2 prescribed by the *Federal Court Immigration Rules, 1993*, serve it on the tribunal and the applicant's solicitor or, where the applicant does not have a solicitor, serve it on the applicant, and file it, with proof after service, at the Registry, within 10 days of service of this application for leave.**

**IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if leave is granted, the subsequent application for judicial review without further notice to you.**

**Note: Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court or the Registry of the Trial Division in Ottawa, telephone: (613) 992-4238.**

**The applicant seeks leave of the Court to commence an application for judicial review of:**

*(Set out the date and details of the decision, order or other matter in respect of which judicial review is sought.)*

*(Set out the name, address and telephone number of the tribunal and, if the tribunal was composed of more than one person, the name of each person who was on the tribunal.)*

*(Set out the tribunal's file number(s), if applicable.)*

**(Add the following paragraph where applicable.)**

**[The applicant further applies to the Court to allow an extension of time under subsection 82.1(5) of the *Immigration Act* on the following grounds:**

*(Set out the grounds for the request for extension of time to file the application for leave.)]*



In the event that leave is granted, the applicant seeks the following relief by way of judicial review:

*(Set out the precise relief sought should leave be granted, including any statutory provision or Rule relied on.)*

In the event that leave is granted, the application for judicial review is to be based on the following grounds:

*(Set out the grounds to be argued, including a reference to any statutory provision or Rule to be relied on.)*

The applicant has *(has not)* received written reasons from the tribunal.

In the event that leave is granted, the applicant proposes that the applicant for judicial review be heard at . . . . . , in the *(English or French)* language.

*(Signature of Solicitor/Applicant)*

*Name of Solicitor/Applicant*

*Address*

*Telephone Number*

TO: *(Name(s) and address(es) of Respondent(s))*

#### FORM IR-2 (Rule 8)

Registry No.

### FEDERAL COURT OF CANADA TRIAL DIVISION

Between:

Applicant(s)

and

Respondent(s)

#### NOTICE OF APPEARANCE

The Respondent(s) *(name(s))* intend(s) to respond to this application.

The tribunal's file number(s), as set out in the application is (are):

*(Date)*

*(Name, address and telephone number  
of Respondent's solicitor, or  
Respondent if acting in person)*

TO: *(Name and address of Applicant's solicitor, or Applicant if acting in person)*

AND TO: *(Name and address of tribunal)*

## FORM IR-3 (Rule 9)

Registry No.

FEDERAL COURT OF CANADA  
TRIAL DIVISION

Between:

Applicant(s)

and

Respondent(s)

## REQUEST TO TRIBUNAL

TO: *(Name and Address of tribunal)*RE: *(Set out complete particulars of the decision, order or other matter as they appear in the application, with tribunal's file number(s), if any.)*

DATE:

In an application filed on . . . . . , 199 . . . . , the applicant set out that he/she had not received written reasons for the above-captioned matter.

Pursuant to Rule 9 of the *Federal Court Immigration Rules, 1993*, you are hereby requested, without delay, to

(a) send a copy of the decision or order, and written reasons therefor, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry; or

(b) if no reasons were given for the decision or order in respect of which the application is made, or reasons were given but not recorded, send an appropriate written notice to all the parties and the Registry.

*(signature of Registry Officer)*

*Name of Registry Officer*

*telephone number*

**FORM IR-4 (Rule 20)**  
**FEDERAL COURT OF APPEAL**

**Registry No.**

**Between:**

(name)

**Appellant**  
**(Applicant (Respondent) in the Trial Division)**

**NOTICE OF APPEAL**  
**(under section 83 of the *Immigration Act*)**

**THE APPELLANT (name) APPEALS** from the judgment of The Honourable (name of judge) of the Trial Division, delivered on (date).

**PURSUANT TO** subsection 83(1) of the *Immigration Act*, the learned Trial Judge certified that the following serious question(s) of general importance was (were) involved:

*(Set out question(s) certified by Trial Judge.)*

**THE APPELLANT SEEKS THE FOLLOWING RELIEF** on the determination of the question(s) under section 52 of the *Federal Court Act*:

*(Set out the relief sought, with reference to the specific provisions in section 52 of the Federal Court Act relied on.)*

**THE APPELLANT REQUESTS** that this appeal be heard at (place).

**Dated at** . . . . . , this . . . . . day of . . . . . , 19 . . . . .

*(Name, address and telephone number  
of Appellant's solicitor)*

**TO:** *(Name and address of Respondent's  
solicitor or Respondent if acting in  
person)*



# APPENDIX I

## Chapter M-23.1

Am. L.Q. 1990, c. 4, s. 583; L.Q. 1991, c. 3; L.Q. 1992, c. 5; L.Q. 1993, c. 70, ss. 1, 2, 3(2), 4, 6, 7, 10, 11(3), (4), (5), (7), (10), (11), 12-18 [L.Q. 1993, c. 70, ss. 3(1), 5, 8, 9, 11(1), (2), (6), (8), (9). Not in force at date of publication.]; L.Q. 1994, c. 15, ss. 12-29.

### AN ACT RESPECTING IMMIGRATION TO QUÉBEC

*This act was formerly entitled “An Act respecting the Ministère de l’Immigration”. The title was replaced by section 1 of chapter 9 of the statutes of 1981.*

*The act was formerly entitled “An Act respecting the Ministère des Communautés culturelles et de l’Immigration”. The title was replaced by 1994, c. 15, s. 12.*

1. [Repealed 1994, c. 15, s. 13.]

### DIVISION I DEFINITION

#### “FOREIGN NATIONAL”.

2. In this act, “foreign national” means a person who is neither a Canadian citizen nor a permanent resident within the meaning of the Immigration Act (Revised Statutes of Canada, 1985, chapter I-2) and the regulations thereunder, who settles temporarily in Québec otherwise than as the representative of a foreign government or as an international civil servant. 1968, c. 68, s. 2; 1974, c. 64, s. 1; 1978, c. 82, s. 1; 1981, c. 9, s. 3; 1994, c. 15, s. 15.

### DIVISION II SELECTION OF FOREIGN NATIONALS

#### SELECTION OF FOREIGN NATIONALS — Duties of Minister.

3. The selection of foreign nationals wishing to settle permanently or temporarily in Québec is effected within the framework of government policy concerning immigrants and foreign nationals. The selection is intended, in particular,

- (a) to contribute to the enrichment of the socio-cultural heritage of Québec, to the stimulation of its economic development and to the pursuit of its demographic objectives;
- (b) to facilitate the reuniting, in Québec, of Canadian citizens and permanent residents with their close relatives from abroad;

(c) to enable Québec to assume its share of responsibilities regarding the reception of refugees and other persons in a particularly distressful situation;  
(d) to favour the coming, among foreign nationals who apply therefor, of persons who will be able to become successfully established in Québec;  
(e) to facilitate the conditions of the stay in Québec of foreign nationals wishing to study, work temporarily or receive medical treatment, having regard to the reasons for their coming and the capacity of Québec to receive them. 1968, c. 68, s. 3; 1969, c. 9, s. 3; 1974, c. 6, s. 111; c. 64, s. 2; 1978, c. 82, s. 2; 1988, c. 41, s. 69; 1993, c. 70, s. 1; 1994, c. 15, s. 17.

***APPLICATION FOR PERMANENT RESIDENCE — Process — Selection certificate — Selection certificate.***

3.1 A foreign national wishing to settle permanently in Québec must file an application with the Minister of International Affairs, Immigration and Cultural Communities in the manner determined by regulation on the form prescribed by the Minister and in accordance with the procedure prescribed under paragraph f of section 3.3.

The Minister shall process the application, having regard to the order of priorities prescribed by regulation.

The Minister shall issue a selection certificate to the foreign national who meets the conditions and criteria of selection determined by regulation.

Notwithstanding the third paragraph, the Minister may, in accordance with the regulations, issue a selection certificate to a foreign national in a particularly distressful situation, in particular, in the case of Convention refugees as defined in the Act respecting immigration to Canada, or in any other case where the Minister considers that the results obtained following the application of the selection criteria do not reflect whether or not the foreign national will be able to become successfully established in Québec. Conversely, the Minister may refuse to issue such a certificate to a foreign national who meets the conditions and criteria of selection if he has reasonable grounds to believe that the foreign national does not intend to settle in Québec or is unlikely to settle successfully in Québec or that the settlement of the foreign national would be contrary to public interest. 1978, c. 82, s. 3; 1992, c. 5, s. 1; 1993, c. 70, s. 2; 1994, c. 15, s. 18.

***UNDERTAKING — Application for undertaking.***

3.1.1 Where determined by regulation, an application for a selection certificate must be supported by an undertaking to assist the foreign national in settling in Québec.

***SELECTION CRITERIA.***

**Where determined by regulation, an undertaking to assist the foreign national**

in settling in Québec shall constitute one of the selection criteria prescribed under paragraph *b* of section 3.3; [1993, c. 70, s. 3(1). Not in force at date of publication.]

The application for an undertaking shall be filed by a person or group of persons determined by regulation according to the conditions prescribed thereby. If, in the opinion of the Minister, the person or group of persons meets the conditions prescribed by regulation, the undertaking shall be subscribed to according to the terms determined by regulation. The application for an undertaking and the undertaking shall be made on the forms prescribed by the Minister. 1991, c. 3, s. 1; 1993, c. 70, s. 3.

#### *APPLICATION — Certificate of identity.*

3.1.2 A foreign national in Québec who does not hold a selection certificate may make an application to the Minister for a certificate of identity. He shall file his application on the form prescribed by the Minister and in accordance with the procedure prescribed under paragraph *f* of section 3.3.

The Minister shall issue a certificate of identity to any foreign national who meets the conditions determined by regulation. 1992, c. 5, s. 2; 1993, c. 70, s. 4.

#### *CONDITIONS.*

3.1.3 The Minister may impose conditions prescribed under paragraph *f*.1.2 of section 3.3 which affect the granting of landing under the Immigration Act, to a foreign national who applies for a selection certificate.

The Minister may, in the cases determined by regulation or at the request of a permanent resident, modify, lift or cancel the conditions imposed. [1993, c. 70, s. 5. Not in force at date of publication.]

#### *TEMPORARY FOREIGN NATIONALS — Certificate of acceptance — Certificate of acceptance.*

3.2 Excepting the classes of foreign nationals excluded by regulation, every foreign national seeking temporary admission to Québec to work, study or receive medical treatment must hold a certificate of acceptance issued by the Minister. He must file an application on the form prescribed by the Minister and in accordance with the procedure prescribed under paragraph *f* of section 3.3.

The Minister shall issue a certificate of acceptance to the foreign national who meets the conditions determined by regulation.

Notwithstanding the second paragraph, the Minister may, in cases provided for by regulation, exempt a foreign national from the application of the conditions contemplated in the second paragraph and issue a certificate of acceptance to him. 1978, c. 82, s. 3; 1979, c. 32, s. 9; 1993, c. 70, s. 6.



**TRUTHFULNESS OF DECLARATIONS.**

3.2.1 Where the Minister so requires, any person must, under penalty of refusal of the application for a selection certificate, a certificate of acceptance or a certificate of identity or for an undertaking, demonstrate to the Minister the truthfulness of the declarations made by the person respecting the application and submit to him, in the manner and time determined by him, any document which the Minister deems to be pertinent. 1991, c. 3, s. 2; 1992, c. 5, s. 3; 1993, c. 70, s. 7.

**CANCELLATION OF CERTIFICATE — Minister's decision.**

3.2.2 The Minister may cancel a selection certificate, a certificate of acceptance, a certificate of identity or an undertaking

- (a) where the certificate was delivered or the undertaking accepted on the basis of false or misleading information or documents;
- (b) where the certificate was delivered or the undertaking accepted by error;
- (c) where the conditions required for the issue of the certificate or the acceptance of the undertaking cease to exist.

The decision of the Minister shall take effect immediately. It must give reasons and be submitted in writing to the person concerned. 1991, c. 3, s. 2; 1992, c. 5, s. 4.

### DIVISION III INTEGRATION OF FOREIGN NATIONALS

**INTEGRATION PROGRAM.**

3.2.3 The Minister shall establish and maintain, for those persons who settle in Québec, an integration program for the purpose of favouring their introduction to Québec life. 1991, c. 3, s. 2.

**LINGUISTIC INTEGRATION SERVICES.**

3.2.4 The Minister, under the integration program, shall provide and take charge of the implementation of linguistic integration services consisting of services of French language instruction and introduction to Québec life. 1991, c. 3, s. 2.

**ELIGIBILITY — Extension of services.**

3.2.5 Immigrants domiciled in Québec who are unable to demonstrate, according to the evaluation procedure prescribed by regulation, a knowledge of French adequate to assuring their harmonious integration with the francophone majority of Québec society who file an application for that purpose

with the Minister on the form prescribed by the latter and who meet the other conditions established by regulation are admissible for linguistic integration services.

The maintaining and extension of the services are conditional upon compliance by the student receiving them with the conditions prescribed by regulation. 1991, c. 3, s. 2; [1993, c. 70, s. 8. Not in force at date of publication.]

#### *FINANCIAL ASSISTANCE.*

3.2.6 The Minister may, according to the conditions prescribed by regulation, allocate financial assistance determined by regulation to a student receiving linguistic integration services. The application for assistance must be filed with the Minister on the form prescribed by the latter. 1991, c. 3, s. 2; [1993, c. 70, s. 9. Not in force at date of publication.]

#### *LOAN.*

3.2.7 The Minister may, according to the conditions prescribed by regulation, grant a loan to an immigrant in a particularly distressful situation with a view to enabling him to discharge the cost or a part of the cost of his immigration to Québec or to assisting him to discharge the costs of becoming established in Québec. An immigrant who is in a particularly distressful situation must file his application for a loan on the form prescribed by the Minister. 1991, c. 3, s. 2; 1993, c. 70, s. 10.

#### *DEFERMENT OF LOAN REPAYMENT — Release from debt.*

3.2.8 The Minister may defer a loan repayment or reduce the obligations of repayment where the borrower shows that he is unable to repay his loan according to the terms and conditions prescribed by regulation.

Where it has been impossible to recover a debt resulting from a loan even though the appropriate recovery measures have been applied to it, the Minister may grant a release from the debt. 1991, c. 3, s. 2.

### **DIVISION IV REGULATIONS AND AGREEMENTS**

#### *REGULATIONS.*

3.3 The Government may make regulations

- (a) determining classes of foreign nationals who have filed an application for a selection certificate referred to in section 3.1;
- (b) determining the conditions of selection applicable to each of such classes, having regard, in particular, to criteria such as the formation and the professional training and experience of the foreign national, the needs of

the labour market in Québec in his profession, his age and personal qualities, his general culture, his knowledge of languages, his financial situation, the assistance he may receive from relatives or friends residing in Québec, and determining the weighting of the selection criteria;

(b) determining the conditions of selection applicable to each of such classes of foreign nationals, having regard, in particular, to criteria such as the vocational or professional training and experience of the foreign national, the needs of the labour market in Québec as regards his profession, the age and personal qualities, education, knowledge of languages, and financial capacity of the foreign national, the assistance he may receive from relatives or friends residing in Québec, his place of destination in Québec, and the place of establishment of his enterprise; such conditions and criteria may vary within the same class, in particular by reason of the foreign national's contribution to enriching the socio-cultural or economic heritage of Québec;

(b.1) determining the classes of foreign nationals which may be exempted from one or several of the conditions and criteria of selection prescribed under paragraph *b* and providing that such exemptions may vary within the same class;

(b.2) determining the classes of foreign nationals in respect of which paragraph *b* applies to a foreign national's dependants, as defined by regulation, and providing for cases of total or partial exemption of dependants from conditions or criteria of selection; such conditions and criteria may vary according to the family situation of the foreign national and also within the same class;

(b.3) determining, from among the criteria prescribed under paragraph *b*, those which apply to a preliminary processing for selection intended to identify the applications which will be processed, prescribing the classes of foreign nationals to which the criteria will apply and determining the cases of total or partial exemption of foreign nationals; the criteria may vary according to the class and also within the same class;

(b.4) prescribing the classes of foreign nationals in respect of which a selection interview must be held, determining the cases of total or partial exemption from this obligation and providing that the obligation may vary within the same class; [1993, c. 70, s. 10(1). Not in force at date of publication.]

(c) determining the cases where an application for a selection certificate must be supported by an undertaking to assist the foreign national in settling in Québec and the cases of termination of an undertaking;

(c.1) determining the persons or groups of persons who may file an application for an undertaking and the conditions of the filing;

(c.2) determining the conditions which must be met by the person or group of persons who subscribe to such an undertaking and prescribing exemptions to one or several conditions by reason of the family situation or minority of the foreign national for whom the undertaking is subscribed;

(c.3) determining the terms of the undertaking and its duration, which may



vary according to the age or circumstances of the foreign national or of his family;

(c.4) determining the cases in which an undertaking to assist a foreign national in settling in Québec constitutes one of the conditions and one of the criteria of selection referred to in paragraph *b*; [1993, c. 70, s. 10(2), Not in force at date of publication.]

(*d*) determining the cases where and the classes of foreign nationals to whom the Minister may issue a selection certificate referred to in the fourth paragraph of section 3.1, and determining the procedure to be followed in a case where the Minister considers that the results obtained following the application of the selection criteria do not reflect whether or not the foreign national will be able to become successfully established in Québec;

(*d.1*) determining the cases in which the certificate of identity referred to in section 3.1.2 is issued, determining, according to the status of the foreign national as established under the Immigration Act, the conditions which must be met by a foreign national applying for a certificate of identity and determining the types of certificates of identity;

(*e*) for the purposes of section 3.2, determining while having particular regard to labour market conditions in Québec, the conditions that must be met by a foreign national seeking to stay temporarily in Québec to work, determining the conditions that must be met by a foreign national seeking to stay temporarily in Québec to study or receive medical treatment, establishing the cases where the Minister may exempt a foreign national from the application of the conditions referred to in the second paragraph of section 3.2 and issue a certificate of acceptance, and determining the classes of foreign nationals who may be excluded from the application of section 3.2;

(*f*) determining the procedure that must be followed in order to obtain a selection certificate under section 3.1, a certificate of identity under section 3.1.2 or a certificate of acceptance under section 3.2, or in order to subscribe an undertaking;

(*f.1*) determining the conditions of validity of a selection certificate or a certificate of acceptance and their duration and providing that the duration of a certificate of acceptance may vary, in the case of a foreign national coming to Québec to study, according to whether he is a minor or of age or according to the program of study or the duration of his studies, in the case of a foreign national coming to Québec to work, according to the duration of his employment, his professional experience or the needs of the labour market in Québec in his profession or, in the case of a foreign national coming to Québec to receive medical treatment, according to the duration of the treatment;

(*f.1.1*) determining the duration of a certificate of identity and the cases in which it lapses and providing that the duration and cases in which it lapses may vary by reason, in particular, of the type of certificate of identity;

(*f.1.2*) for the purposes of section 3.1.3, providing conditions affecting the

granting of landing under the Immigration Act to a foreign national who applies for a selection certificate under section 3.1 so as to ensure, in particular, the protection of public health, the meeting of regional or sectorial needs for specialized labour, the regional or sectorial creation of enterprises or the financing of such enterprises, and the socio-economic integration of the foreign national, determining classes of foreign nationals according to which such conditions may vary and providing that such conditions may vary within the same class;

(f.1.3) determining the classes of foreign nationals which may be exempted from one or several conditions prescribed under paragraph f.1.2 and providing that such exemptions may vary within the same class;

(f.1.4) determining the duration of the conditions prescribed under section 3.1.3, determining the classes of foreign nationals according to which the duration may vary and providing that the duration may vary within the same class;

(f.1.5) determining the cases in which the conditions prescribed under section 3.1.3 may be modified, lifted or cancelled; [1993, c. 70, s. 10(6). Not in force at date of publication.]

(f.2) establishing the duties payable for processing an application for an undertaking, a certificate of identity, a selection certificate or a certificate of acceptance, for issuing a certificate of identity or other certificate or for subscribing an undertaking, and determining the cases of total or partial exemption from their payment; the duties may vary in the case of an undertaking according to the family situation of the foreign national, in the case of a certificate of identity according to the authorization granted the foreign national to be in Canada, in the case of a selection certificate according to the classes of foreign nationals or, in the case of a certificate of acceptance according to the reason for the temporary admission of the foreign national to Québec;

(g) prescribing an order of priorities for the processing of applications for a selection certificate referred to in section 3.1;

(h) determining, with regard to linguistic integration services, the services offered, the teaching program, the conditions of admissibility to the services, the form and tenor of an application, the conditions of obtaining, maintaining and extending the said services, the appropriate training period and the procedure for evaluating the knowledge of French; these provisions may vary according to services and classes of immigrants or of students; [1990, c. 70, s. 10(8) delete the words "the form and tenor of an application". Not in force at date of publication.]

(i) determining, with regard to financial assistance for the purposes of linguistic integration services, the classes of allocation, the conditions of admissibility, and the conditions of granting, the form and tenor of an application and the nature and schedule of financial assistance; these provisions may vary according to services and classes of immigrants or of

students and, within the same class of immigrants or of students, according to the family and financial situation of the students; [1990, c. 70, s. 10(9) deletes the words “the form and tenor of an application”. Not in force at date of publication.]

(j) determining, with a view to assisting the reception and settlement of immigrants in a particularly distressful situation, the classes of loans, the conditions of granting and of repayment thereof, and the applicable rate of interest.

Unless the context indicates otherwise, “prescribed”, in the regulations, means prescribed by the Minister. 1978, c. 82, s. 3; 1979, c. 32, s. 10; 1981, c. 23, s. 32; 1984, c. 47, s. 103; 1987, c. 75, s. 1; 1991, c. 3, s. 3; 1992, c. 5, s. 5; 1993, c. 70, s. 11.

## REGULATIONS.

### 3.4 The Minister may, by regulation,

- (a) establish the weighting of selection criteria and the passing score and, where expedient, the cutoff score determined in relation to a selection criterion, applicable to the preliminary stage of selection established under paragraph *b.3* of section 3.3 and to the selection established under paragraph *b* of section 3.3, which weighting and which scores may vary according to the family situation of the foreign national, according to the classes of foreign nationals and within the same class of foreign nationals;
- (b) determine that the regulation applies to applications that are being processed, or to applications filed after a particular date that are being processed, or to those that have not yet reached a particular stage on the date of coming into force of the regulation.

A regulation made under this section is not subject to the requirement to publish contained in section 8 of the Regulations Act (R.S.Q., chapter R-18.1) and, notwithstanding section 17 of that Act, comes into force on the date of its publication in the *Gazette officielle du Québec*, or at any later date fixed in the regulation. [1993, c. 70, s. 12. Not in force at date of publication.]

4. [Repealed 1994, c. 15, s. 21.]

5. [Repealed 1988, c. 41, s. 70.]

## AGREEMENTS — *Agreements for exchange of information.*

6. The Minister may, according to law, make any agreement with the Government of Canada or any body thereof and with any other government or body, in conformity with the interests and rights of Québec, to facilitate the carrying out of this act. 1968, c. 68, s. 7.

He may make any agreement, in the same manner and with the same authorities or with any department or body of the Gouvernement du Québec,



for the exchange of information obtained under an Act entrusted to the administration of that Government, department or body, in order to attain the immigration objectives or to discharge the obligations incumbent upon him under this Act. 1991, c. 3, s. 4; 1993, c. 70, s. 13; 1994, c. 15, s. 22.

7-8. [Repealed 1984, c. 44, s. 21.]

9-12. [Repealed 1994, c. 15, s. 23.]

## DIVISION V INVESTIGATIONS

### *INQUIRIES.*

12.1 The Minister or any person designated by him as an investigator or inspector may make inquiries in order to ensure that this Act and the regulations are being complied with and to prevent, detect or repress contraventions to this Act. 1978, c. 82, s. 5; 1991, c. 3, s. 5; 1992, c. 5, s. 6; 1993, c. 70, s. 14.

### *POWERS AND IMMUNITY.*

12.1.1 In conducting an investigation, the Minister and investigators are vested with the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions (R.S.Q., chapter C-37), except the power to order imprisonment. 1993, c. 70, s. 15.

### *INFORMATION.*

12.1.2 An inspector may, for the purposes of this Act and the regulations, require any information and any document and examine and make copies of such documents. 1993, c. 70, s. 15.

### *IMMUNITY.*

12.1.3 No inspector may be prosecuted for acts performed in good faith in the carrying out of his duties. 1993, c. 70, s. 15.

### *IDENTIFICATION.*

12.1.4 On request, an inspector or investigator shall identify himself and produce the certificate signed by the Minister and attesting his capacity. 1993, c. 70, s. 15.

### *COPY OF DOCUMENTS.*

12.2 Any copy of a book, register or document produced for an investigation and certified by the Minister or an investigator as being a true copy of the

original, is admissible as proof and has the same probative force as the original. 1991, c. 3, s. 5.

## DIVISION VI PENAL PROVISIONS

### *OFFENCE.*

12.3 Every person is guilty of an offence who communicates information he knows or should have known to be false or misleading to the Minister or to an investigator or inspector in relation to an application

- (a) for a selection certificate, a certificate of acceptance, a certificate of identity or an undertaking;
- (b) for access to linguistic integration services;
- (c) for financial assistance for a student receiving linguistic integration services;
- (d) for a loan for an immigrant in a particularly distressful situation. 1978, c. 82, s. 5; 1991, c. 4, s. 583; 1991, c. 3, s. 5; 1992, c. 5, s. 7; 1993, c. 70, s. 16.

### *OFFENCE.*

12.4 Every person who contributes to the issue of a foreign national of a selection certificate, a certificate of acceptance or a certificate of identity in contravention of this Act is guilty of an offence. 1991, c. 3, s. 5; 1992, c. 5, s. 8.

### *OFFENCE AND PENALTY.*

12.4.1 Every person who obstructs an inspector in the carrying out of his duties is guilty of an offence. 1993, c. 70, s. 17.

### *FINE — Legal person — Subsequent offence.*

12.5 A natural person is liable to a fine of \$500 to \$1 000 in the case of an offence under section 12.3, to a fine of \$1 000 to \$10 000 in the case of an offence under section 12.4, and to a fine of \$250 to \$1 000 in the case of an offence under section 12.4.1. 1993, c. 70, s. 18.

Where the offence is committed by a legal person, the fine shall be doubled.

In the case of a second or subsequent offence, the fine prescribed for a first offence shall be doubled. 1991, c. 3, s. 5.

### *PARTIES TO OFFENCE.*

12.6 Where a legal person is guilty of an offence described by this Act, the administrator, director, official or representative of the legal person who

prescribed or authorized the performance of the act or the omission which constitutes the offence or who consented thereto is party to the offence and liable to the penalty prescribed by law. 1991, c. 3, s. 5.

### ***PRESCRIPTION.***

12.7 Prescription of penal proceedings begins to run, for an offence contemplated by section 12.3, on the date of examination of the information disclosed to the Minister or investigator and, for an offence contemplated by section 12.4, on the date of examination of the application of the selection certificate, the certificate of acceptance or the certificate of identity. 1991, c. 3, s. 5; 1992, c. 5, s. 9.

13-16. [Repealed 1994, c. 15, s. 26.]

## **DIVISION VII BUREAU DE RÉVISION EN IMMIGRATION**

### ***BUREAU DE RÉVISION EN IMMIGRATION.***

17. A body known as the Bureau de révision en immigration is hereby instituted. It shall hear and determine, to the exclusion of every other tribunal, any application for review made under section 26. 1991, c. 3, s. 6.

### ***COMPOSITION OF BUREAU — Chairman.***

18. Subject to the provisions of the second paragraph, the Bureau de révision shall be composed of one member appointed by the Government for a term not exceeding five years.

The Government may, if necessary, appoint not more than two additional members for a term not exceeding five years. In that case, it shall designate a chairman. 1991, c. 3, s. 6.

### ***REMUNERATION.***

19. The Government shall determine the salary and the other conditions of employment of the members of the Bureau de révision. The remuneration of members may in no case be reduced once it has been fixed. 1991, c. 3, s. 6.

### ***EXCLUSIVITY OF OFFICE.***

20. The members of the Bureau de révision are required to devote themselves exclusively to their functions. 1991, c. 3, s. 6.

### ***POWERS AND IMMUNITY.***

21. The members of the Bureau de révision shall be vested with the powers



and the immunity of commissioners appointed under the Act respecting public inquiry commissions, except the power to impose imprisonment. 1991, c. 3, s. 6.

*GENERAL ADMINISTRATION — Coordination — Replacement of Chairman.*

22. The member or the chairman, if designated, shall be responsible for the general administration of the Bureau de révision.

The chairman shall coordinate, assign and supervise the work of the members who, in this respect, must comply with his instructions.

Where the chairman is absent or unable to act, a member designated by the Government shall take his place. 1991, c. 3, s. 6.

*HEAD OFFICE.*

23. The head office of the Bureau de révision shall be located in the territory of the Communauté urbaine de Montréal at such place as the Government may determine. Notice of that location and of any change of location of the head office shall be published in the *Gazette officielle du Québec*. 1991, c. 3, s. 6.

*HUMAN AND FINANCIAL RESOURCES.*

24. The Minister shall provide the Bureau de révision, to the extent and on the conditions determined by the Government, with the necessary human, financial and material resources. 1991, c. 3, s. 6.

*APPLICATION FOR REVIEW.*

25. Any member, acting in the name of the Bureau de révision, may hear and determine alone an application for review. He may sit at any place in Québec. 1991, c. 3, s. 6.

*APPLICATIONS.*

26. The following persons may apply for a review of the Minister's decision:

- (a) any person or group of persons whose application for an undertaking is rejected or whose undertaking is cancelled;
- (b) any foreign national whose selection certificate or certificate of acceptance is cancelled. 1991, c. 3, s. 6.

*CONTENTS OF APPLICATION.*

27. An application for review must be made in writing within sixty days of the date of sending of the Minister's decision to the person concerned. It

shall indicate the decision of which review is requested, contain a summary account of the grounds invoked and indicate, where necessary, the name and address of the person representing the applicant. 1991, c. 3, s. 6.

#### *TIME LIMIT.*

28. The Bureau de révision may release the applicant from any failure to respect the prescribed time limit if he was in fact unable to act sooner. 1991, c. 3, s. 6.

#### *NOTICE OF RECEIPT — Transmission of notice.*

29. Upon receiving the application, the Bureau de révision shall give the Minister notice of it.

The Minister is required, upon receiving the notice or within the time limit granted by the Bureau de révision, to transmit to it the file relating to the decision. 1991, c. 3, s. 6.

#### *DEPOSIT OF APPLICATION.*

30. Deposit of an application for review shall not suspend the decision of the Minister. 1991, c. 3, s. 6.

#### *REPRESENTATIVE.*

31. The applicant may be represented or aided by an advocate. He may also be represented by a relative or by a non-profit organization devoted to the defense or interests of immigrants, if unable to be present himself by reason of absence from Québec. In the latter case, his mandatory must provide the Bureau de révision with a mandate in writing, signed by the person represented, indicating the gratuitous nature of the mandate. 1991, c. 3, s. 6.

#### *HEARING.*

32. Before rendering a decision, the Bureau de révision must allow each party to be heard orally or, at the wish of the party, in writing. 1991, c. 3, s. 6.

#### *CONFIRMATION OF DECISION.*

33. The Bureau de révision may confirm, alter or quash any decision which is the object of an application for review. Its decision must be in writing and give the reasons on which it is based. 1991, c. 3, s. 6.

*DECISION FINAL.*

34. Every decision of the Bureau de révision is final and without appeal. 1991, c. 3, s. 6.

*REVIEW OF DECISION.*

35. The Bureau de révision may, of its own initiative or at the request of an interested person, review or cancel any decision it has rendered

- (a) where a new fact is discovered which, if it had been known in due time, might have justified a different decision;
  - (b) where one party was not able, for reasons deemed sufficient, to be heard;
  - (c) where a substantial or procedural defect is likely to invalidate the decision.
- 1991, c. 3, s. 6.

*RECOURSES — Annulment of judgment.*

36. Except on a question of jurisdiction, no recourse provided in articles 33 and 834 to 850 of the Code of Civil Procedure may be exercised and no injunction may be granted against the Bureau de révision or against one of its members acting in his official capacity.

A judge of the Court of Appeal, upon motion, may annul summarily any judgment, order or injunction issued or granted contrary to this section. 1991, c. 3, s. 6.

*COPY OF DECISION.*

37. A copy of the decision of the Bureau de révision shall be transmitted to the parties by registered or certified mail or by any other means allowing proof of receipt. 1991, c. 3, s. 6.

*RULES OF PROOF AND PROCEDURE.*

38. The Bureau de révision may, by by-law, lay down rules of proof, procedure and practice. By-laws made under this section are subject to Government approval. 1991, c. 3, s. 6.

*REPORT OF ACTIVITIES.*

39. The Bureau de révision shall transmit to the Minister, no later than 31 July each year, a report of its activities, which the Minister shall table before the National Assembly within six months of the end of each fiscal year or, if the National Assembly is not sitting, within 30 days of resumption. 1991, c. 3, s. 6; 1992, c. 5, s. 11; 1994, c. 15, s. 28.



**DIVISION VIII  
FINAL PROVISION**

**40. The Minister of International Affairs, Immigration and Cultural Communities is responsible for the administration of this Act. 1994, c. 15, s. 29.**

**CONCORDANCE TABLE**

<b>STATUTES OF QUÉBEC, 1968</b>	<b>REVISED STATUTES</b>
<b>Chapter 68</b>	<b>Chapter M-23.1</b>
<b>IMMIGRATION</b>	<b>AN ACT RESPECTING</b>
<b>DEPARTMENT</b>	<b>THE MINISTÈRE</b>
<b>ACT</b>	<b>DES COMMUNAUTÉS</b>
	<b>CULTURELLES ET</b>
	<b>DE L'IMMIGRATION</b>
	<i>An Act respecting</i>
	<i>the Ministère de</i>
	<i>l'immigration</i>

SECTIONS	SECTIONS	REMARKS
1-3	1-3	
3a	3.1	
3b	3.2	
3c	3.3	
4 - 5	4 - 5	
6		Repealed 1974, c. 64, s. 3
7	6	
8	7	
9	8	
10	9	
11	10	
12	11	
13	12	
13a	12.1	
13b	12.2	
13c	12.3	
14	13	
15	14	
16	15	
17	16	

**S.Q. 1968, c. 68      R.S., c. M-23.1**

SECTIONS	SECTIONS	REMARKS
18		Amendment integrated into c. E-18, s. 4
19		Amendment integrated into c. M-34, s. 1
20		Amendment integrated into c. M-14, s. 2
21		Amendment integrated into c. E-7, s. 1
22 - 23		Omitted

*The Concordance Table indicates all section numbers, whether or not they have been renumbered. Other divisions (i.e. Part, Chapter, Division, Subdivision, Paragraph, etc.), where applicable, are indicated only where they have been renumbered.*

*The term "Omitted" in the "Remarks" column refers to a section that does not appear in the consolidation because it is without effect, not in force, or of a temporary, transitory, local or private character, or because its object has been accomplished or it is a repealing or replacing section.*



## **APPENDIX II**

### **Chapter 16 of the North American Free Trade Agreement**

#### **Chapter Sixteen**

#### **Temporary Entry for Business Persons**

##### **Article 1601: General Principles**

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories.

##### **Article 1602: General Obligations**

1. Each Party shall apply its measures relating to the provisions of this Chapter in accordance with Article 1601 and, in particular, shall apply expeditiously those measures so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities under this Agreement.

2. The Parties shall endeavour to develop and adopt common criteria, definitions and interpretations for the implementation of this Chapter.

##### **Article 1603: Grant of Temporary Entry**

1. Each Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security, in accordance with this Chapter, including the provisions of Annex 1603.

2. A Party may refuse to issue an immigration document authorizing employment to a business person where the temporary entry of that person might affect adversely:

- (a) the settlement of any labour dispute that is in progress at the place or intended place of employment; or
- (b) the employment of any person who is involved in such dispute.

3. When a Party refuses pursuant to paragraph 2 to issue an immigration document authorizing employment, it shall:

- (a) inform in writing the business person of the reasons for the refusal;  
and

- (b) promptly notify in writing the Party whose business person has been refused entry of the reasons for the refusal.

4. Each Party shall limit any fees for processing applications for temporary entry of business persons to the approximate cost of services rendered.

#### **Article 1604: Provision of Information**

1. Further to Article 1802 (Publication), each Party shall:

- (a) provide to the other Parties such materials as will enable them to become acquainted with its measures relating to this Chapter; and
- (b) no later than one year after the date of entry into force of this Agreement, prepare, publish and make available in its own territory, and in the territories of the other Parties, explanatory material in a consolidated document regarding the requirements for temporary entry under this Chapter in such a manner as will enable business persons of the other Parties to become acquainted with them.

2. Subject to Annex 1604.2, each Party shall collect and maintain, and make available to the other Parties in accordance with its domestic law, data respecting the granting of temporary entry under this Chapter to business persons of the other Parties who have been issued immigration documentation, including data specific to each occupation, profession or activity.

#### **Article 1605: Working Group**

1. The Parties hereby establish a Temporary Entry Working Group, comprising representatives of each Party, including immigration officials.

2. The Working Group shall meet at least once each year to consider:

- (a) the implementation and administration of this Chapter;
- (b) the development of measures to further facilitate temporary entry of business persons on a reciprocal basis;
- (c) the waiving of labour certification tests or procedures of similar effect for spouses of business persons who have been granted temporary entry for more than one year under Section B, C or D of Annex 1603; and
- (d) proposed modifications of or additions to this Chapter.

#### **Article 1606: Dispute Settlement**

1. A Party may not initiate proceedings under Article 2007 (Commission — Good Offices, Conciliation and Mediation) regarding a refusal to grant temporary entry under this Chapter or a particular case arising under Article 1602(1) unless:

- (a) the matter involves a pattern of practice; and

- (b) the business person has exhausted the available administrative remedies regarding the particular matter.

2. The remedies referred to in paragraph (1)(b) shall be deemed to be exhausted if a final determination in the matter has not been issued by the competent authority within one year of the institution of an administrative proceeding, and the failure to issue a determination is not attributable to delay caused by the business person.

#### **Article 1607: Relation to Other Chapters**

Except for this Chapter, Chapters One (Objectives), Two (General Definitions), Twenty (Institutional Arrangements and Dispute Settlement Procedures) and Twenty-two (Final Provisions) and Articles 1801 (Contacts Points), 1802 (Publication), 1803 (Notification and Provision of Information) and 1804 (Administrative Proceedings), no provision of this Agreement shall impose any obligation on a Party regarding its immigration measures.

#### **Article 1608: Definitions**

For purposes of this Chapter:

business person means a citizen of a Party who is engaged in trade in goods, the provision of services or the conduct of investment activities;  
 citizen means “citizen” as defined in Annex 1608 for the Parties specified in that Annex;  
 existing means “existing” as defined in Annex 1608 for the Parties specified in that Annex;  
 temporary entry means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence.

### **Annex 1603**

#### **Temporary Entry for Business Persons**

##### **Section A. Business Visitors**

1. Each Party shall grant temporary entry to a business person seeking to engage in a business activity set out in Appendix 1603.A.1, without requiring that person to obtain an employment authorization, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry, on presentation of:

- (a) proof of citizenship of a Party;
- (b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry; and
- (c) evidence demonstrating that the proposed business activity is inter-



**national in scope and that the business person is not seeking to enter the local labor market.**

**2. Each party shall provide that a business person may satisfy the requirements of paragraph 1(c) by demonstrating that:**

- (a) the primary source of remuneration for the proposed business activity is outside the territory of the Party granting temporary entry; and**
- (b) the business person's principal place of business and the actual place of accrual of profits, at least predominantly, remain outside such territory.**

**A Party shall normally accept an oral declaration as to the principal place of business and the actual place of accrual of profits. Where the Party requires further proof, it shall normally consider a letter from the employer attesting to these matters as sufficient proof.**

**3. Each Party shall grant temporary entry to a business person seeking to engage in a business activity other than those set out in Appendix 1603.A.1, without requiring that person to obtain an employment authorization, on a basis no less favourable than that provided under the existing provisions of the measures set out in Appendix 1603.A.3, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry.**

**4. No Party may:**

- (a) as a condition for temporary entry under paragraph 1 or 3, require prior approval procedures, petitions, labour certification tests or other procedures of similar effect; or**
- (b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1 or 3.**

**5. Notwithstanding paragraph 4, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult, on request, with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal.**

## **Section B. Traders and Investors**

**1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to:**

- (a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the Party into which entry is sought, or**
- (b) establish, develop, administer or provide advice or key technical**

services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive or involves essential skills,

provided that the business person otherwise complies with existing immigration measures applicable to temporary entry.

2. No Party may:

- (a) as a condition for temporary entry under paragraph 1, require labor certification tests or other procedures of similar effect; or
- (b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry.

#### Section C. Intra-Company Transferees

1. Each Party shall grant temporary entry and provide confirming documentation to a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry. A Party may require the business person to have been employed continuously by the enterprise for one year within the three-year period immediately preceding the date of the application for admission.

2. No Party may:

- (a) as a condition for temporary entry under paragraph 1, require labor certification tests or other procedures of similar effect; or
- (b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal.

#### Section D. Professionals

1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to engage in a business activity

at a professional level in a profession set out in Appendix 1603.D.1, if the business person otherwise complies with existing immigration measures applicable to temporary entry, on presentation of:

- (a) proof of citizenship of a Party; and
- (b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry.

**2. No Party may:**

- (a) as a condition for temporary entry under paragraph 1, require prior approval procedures, petitions, labor certification tests or other procedures of similar effect; or
- (b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry. Before imposing a visa requirement, the Party shall consult with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a party whose business persons are subject to the requirement with a view to its removal.

4. Notwithstanding paragraphs 1 and 2, a Party may establish an annual numerical limit, which shall be set out in Appendix 1603.D.4, regarding temporary entry of business persons of another Party seeking to engage in business activities at a professional level in a profession set out in Appendix 1603.D.1, if the Parties concerned have not agreed otherwise prior to the date of entry into force of this Agreement for those Parties. In establishing such a limit, the Party shall consult with the other Party concerned.

5. A Party establishing a numerical limit pursuant to paragraph 4, unless the Parties concerned agree otherwise:

- (a) shall, for each year after the first year after the date of entry into force of this Agreement, consider increasing the numerical limit set out in Appendix 1603.D.4 by an amount to be established in consultation with the other Party concerned, taking into account the demand for temporary entry under this Section;
- (b) shall not apply its procedures established pursuant to paragraph 1 to the temporary entry of a business person subject to the numerical limit, but may require the business person to comply with its other procedures applicable to the temporary entry of professionals; and
- (c) may, in consultation with the other Party concerned, grant temporary entry under paragraph 1 to a business person who practices in a profession where accreditation, licensing, and certification requirements are mutually recognized by those Parties.



6. Nothing in paragraph 4 or 5 shall be construed to limit the ability of a business person to seek temporary entry under a Party's applicable immigration measures relating to the entry of professionals other than those adopted or maintained pursuant to paragraph 1.

7. Three years after a Party establishes a numerical limit pursuant to paragraph 4, it shall consult with the other Party concerned with a view to determining a date after which the limit shall cease to apply.

## **Appendix 1603.A.1**

### **Business Visitors**

#### **Research and Design**

- Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

#### **Growth, Manufacture and Production**

- Harvester owner supervising a harvesting crew admitted under applicable law.
- Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

#### **Marketing**

- Market researchers and analysts conducting independent research or analysis or research or analysis for an enterprise located in the territory of another Party.
- Trade fair and promotional personnel attending a trade convention.

#### **Sales**

- Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the territory of another Party but not delivering goods or providing services.
- Buyers purchasing for an enterprise located in the territory of another Party.

#### **Distribution**

- Transportation operators transporting goods or passengers to the territory of a Party from the territory of another Party or loading and transporting goods or passengers from the territory of a Party, with no unloading in that territory, to the territory of another Party.
- With respect to temporary entry into the territory of the United States,

Canadian customs brokers performing brokerage duties relating to the export of goods from the territory of the United States to or through the territory of Canada.

- With respect to temporary entry into the territory of Canada, United States customs brokers performing brokerage duties relating to the export of goods from the territory of Canada to or through the territory of the United States.
- Customs brokers providing consulting services regarding the facilitation of the import or export of goods.

### After-Sales Service

- Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the territory of the Party into which temporary entry is sought, during the life of the warranty or service agreement.

### General Service

- Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1.
- Management and supervisory personnel engaging in a commercial transaction for an enterprise located in the territory of another Party.
- Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party.
- Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.
- Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in the territory of another Party.
- Tour bus operators entering the territory of a Party:
  - (a) with a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party;
  - (b) to meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in the territory of another Party; or
  - (c) with a group of passengers on a bus tour to be unloaded in the territory of the Party into which temporary entry is sought, and returning with no passengers or reloading with the group for transportation to the territory of another Party.

- Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

## Definitions

For purposes of this Appendix:

- territory of another Party means the territory of a Party other than the territory of the Party into which temporary entry is sought;
- tour bus operator means a natural person, including relief personnel accompanying or following to join, necessary for the operation of a tour bus for the duration of a trip; and
- transportation operator means a natural person, other than a tour bus operator, including relief personnel accompanying or following to join, necessary for the operation of a vehicle for the duration of a trip.

## Appendix 1603.A.3 Existing Immigration Measures

1. In the case of Canada, subsection 19(1) of the *Immigration Regulations*, 1978, SOR/78-172, as amended, made under the *Immigration Act*, R.S.C. 1985, c. 1-2, as amended.
2. In the case of the United States, section 101(a)(15)(B) of the *Immigration and Nationality Act*, 1952, as amended.
3. In the case of Mexico, Chapter III of the *Ley General de Poblacion*, 1974, as amended.

## Appendix 1603.D.1 Professionals

PROFESSION <sup>1</sup>	MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS
General Accountant	Baccalaureate or Licenciatura Degree, or C.P.A., C.A., C.G.A., C.M.A.
Architect	Baccalaureate or Licenciatura Degree; or state/ provincial license <sup>2</sup>

<sup>1</sup> A business person seeking temporary entry under this Appendix may also perform training functions relating to the profession, including conducting seminars.

<sup>2</sup> "State/provincial license" and "state/provincial/federal license" mean any document issued by a state, provincial or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.



<b>Computer Systems Analyst</b>	<b>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma<sup>3</sup> or Post-Secondary Certificate,<sup>4</sup> and three years experience</b>
<b>Disaster Relief Insurance Claims Adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)</b>	<b>Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims</b>
<b>Economist</b>	<b>Baccalaureate or Licenciatura Degree</b>
<b>Engineer</b>	<b>Baccalaureate or Licenciatura Degree; or state/provincial license</b>
<b>Forester</b>	<b>Baccalaureate or Licenciatura Degree; or state/provincial license</b>
<b>Graphic Designer</b>	<b>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</b>
<b>Hotel Manager</b>	<b>Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management</b>
<b>Industrial Designer</b>	<b>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</b>
<b>Interior Designer</b>	<b>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</b>
<b>Land Surveyor</b>	<b>Baccalaureate or Licenciatura Degree; or state/provincial/federal license</b>
<b>Landscape Architect</b>	<b>Baccalaureate or Licenciatura Degree</b>
<b>Lawyer (including Notary in the Province of Quebec)</b>	<b>LL.B., J.D., LL.L., B.C.L. or Licenciatura Degree (five years); or membership in a state/provincial bar</b>
<b>Librarian</b>	<b>M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)</b>

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3 "Post-Secondary Diploma" means a credential issued, on completion of two or more years of post-secondary education, by an accredited academic institution in Canada or the United States.

4 "Post-Secondary Certificate" means a certificate issued, on completion of two or more years of post-secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

<b>Management Consultant</b>	Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement
<b>Mathematician (including Statistician)</b>	Baccalaureate or Licenciatura Degree
<b>Range Manager/Range Conservationist</b>	Baccalaureate or Licenciatura Degree
<b>Research Assistant (working in a post-secondary educational institution)</b>	Baccalaureate or Licenciatura Degree
<b>Scientific Technician/Technologist<sup>5</sup></b>	Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geo-physics, meteorology or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
<b>Social Worker</b>	Baccalaureate or Licenciatura Degree
<b>Sylviculturist (including Forestry Specialist)</b>	Baccalaureate or Licenciatura Degree
<b>Technical Publications Writer</b>	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
<b>Urban Planner (including Geographer)</b>	Baccalaureate or Licenciatura Degree
<b>Vocational Counsellor</b>	Baccalaureate or Licenciatura Degree
<b>Medical/Allied Professional</b>	
<b>Dentist</b>	D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental; or state/provincial license
<b>Dietitian</b>	Baccalaureate or Licenciatura Degree; or state/provincial license
<b>Medical Laboratory Technologist (Canada)/ Medical Technologist (Mexico and the United States)<sup>6</sup></b>	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
<b>Nutritionist</b>	Baccalaureate or Licenciatura Degree
<b>Occupational Therapist</b>	Baccalaureate or Licenciatura Degree; or state/provincial license

5 A business person in this category must be seeking temporary entry to work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

6 A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment or prevention of disease.

Pharmacist	Baccalaureate or Licenciatura Degree; or state/provincial license
Physician (teaching and/or research only)	M.D. or Doctor en Medicina; or state/provincial license
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Psychologist	State/provincial license; or Licenciatura Degree
Recreational Therapist	Baccalaureate or Licenciatura Degree
Registered Nurse	State/provincial license; or Licenciatura Degree
Veterinarian	D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license
Scientist	
Agriculturist (Agronomist)	Baccalaureate or Licenciatura Degree
Animal Breeder	Baccalaureate or Licenciatura Degree
Animal Scientist	Baccalaureate or Licenciatura Degree
Apiculturist	Baccalaureate or Licenciatura Degree
Astronomer	Baccalaureate or Licenciatura Degree
Biochemist	Baccalaureate or Licenciatura Degree
Biologist	Baccalaureate or Licenciatura Degree
Chemist	Baccalaureate or Licenciatura Degree
Dairy Scientist	Baccalaureate or Licenciatura Degree
Entomologist	Baccalaureate or Licenciatura Degree
Epidemiologist	Baccalaureate or Licenciatura Degree
Geneticist	Baccalaureate or Licenciatura Degree
Geologist	Baccalaureate or Licenciatura Degree
Geochemist	Baccalaureate or Licenciatura Degree
Geophysicist (including Oceanographer in Mexico and the United States)	Baccalaureate or Licenciatura Degree
Horticulturist	Baccalaureate or Licenciatura Degree
Meteorologist	Baccalaureate or Licenciatura Degree
Pharmacologist	Baccalaureate or Licenciatura Degree
Physicist (including Oceanographer in Canada)	Baccalaureate or Licenciatura Degree
Plant Breeder	Baccalaureate or Licenciatura Degree
Poultry Scientist	Baccalaureate or Licenciatura Degree
Soil Scientist	Baccalaureate or Licenciatura Degree
Zoologist	Baccalaureate or Licenciatura Degree



Teacher

College

Seminary

University

Baccalaureate or Licenciatura Degree

Baccalaureate or Licenciatura Degree

Baccalaureate or Licenciatura Degree

## Appendix 1603.D.4 United States

1. Beginning on the date of entry into force of this Agreement as between the United States and Mexico, the United States shall annually approve as many as 5,500 initial petitions of business persons of Mexico seeking temporary entry under Section D of Annex 1603 to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1.

2. For purposes of paragraph 1, the United States shall not take into account:

- (a) the renewal of a period of temporary entry;
- (b) the entry of a spouse or children accompanying or following to join the principal business person;
- (c) an admission under section 101(a)(15)(H)(i)(b) of the *Immigration and Nationality Act*, 1952, as may be amended, including the worldwide numerical limit established by section 214(g)(1)(A) of that Act; or
- (d) an admission under any other provision of section 101(a)(15) of that Act relating to the entry of professionals.

3. Paragraphs 4 and 5 of Section D of Annex 1603 shall apply as between the United States and Mexico for no longer than:

- (a) the period that such paragraphs or similar provisions may apply as between the United States and any other Party other than Canada or any non-Party; or
- (b) 10 years after the date of entry into force of this Agreement as between such Parties,

whichever period is shorter.

## Annex 1604.2 Provision of Information

The obligations under Article 1604(2) shall take effect with respect to Mexico one year after the date of entry into force of this Agreement.

## **Annex 1608**

### **Country—Specific Definitions**

**For purposes of this Chapter:**

**citizen means, with respect to Mexico, a national or a citizen according to the existing provisions of Articles 30 and 34, respectively, of the Mexican Constitution; and**

**existing means, as between:**

- (a) Canada and Mexico, and Mexico and the United States, in effect on the date of entry into force of this Agreement; and**
- (b) Canada and the United States, in effect on January 1, 1989.**

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ISBN 0-456-55864-1



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